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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

[SUPREME COURT] OF OHIO

REPORTED BY
EMILIUS O. RANDALL
SUPREME COURT REPORTER

NEW SERIES
VOLUME LXXXVIII

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JUDGES OF THE SUPREME COURT OF OHIO

For the time commencing January 1, 1913, and ending
September 22, 1913.

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| HON. JOHN A. SHAUCK, CHIEF JUSTICE. | |
| HON. JAMES G. JOHNSON, JR., | } Judges. |
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| HON. R. M. WANAMAKER, | |
| HON. OSCAR W. NEWMAN, | |
| HON. J. FOSTER WILKIN, | |

For the time commencing September 22, 1913, and ending
January 1, 1915.

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| HON. JOHN A. SHAUCK, | } Judges. |
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- Section 2916, *et seq.*, Revised Statutes. Primary elections. *Fitzgerald v. Cleveland*, 355.
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- Section 3244, Revised Statutes. Incorporation; liability for deficiency in ten per cent. of stock subscribed. *Ames v. McCaughey*, 297.
- Section 3283, Revised Statutes. Railroad companies; appropriation of public property; procedure. *Cincinnati v. Railroad Co.*, 287.
- Section 3283a, Revised Statutes (99 O. L., 590). Appropriation of easement, in certain cases. *Cincinnati v. Railroad Co.*, 283.
- Section 3384, Revised Statutes. Railroad companies; merger; property of old companies vests in new. *Boehmke v. Traction Co.*, 161.
- Section 4447, *et seq.*, Revised Statutes. County ditches; money collected therefor; public moneys. *State, ex rel., v. Baker*, 165.
- Section 6420, Revised Statutes. Appropriation of property; jurisdictional questions to be first determined. *Cincinnati v. Railroad Co.*, 283.

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MEMORIAL
OF LIFE, CHARACTER AND PUBLIC SERVICES
OF
MARTIN DEWEY FOLLETT.

*To the Honorable Judges of the Supreme Court of
Ohio:*

Martin Dewey Follett was born in Enosburg, Franklin county, Vermont, October 8, 1826, the son of Captain John Fassett Follett and grandson of Martin Dewey Follett. He died at Marietta, Ohio, August 22, 1911, at his residence, 326 Front street. Many members of his family had risen to prominence in colonial and revolutionary times. In 1836 his father, with his wife and nine children, came west and settled on a farm in Licking county, Ohio, where the subject of our sketch grew to manhood. Having taught school for several years, he entered Marietta college and graduated, with highest honors, in the class of 1853, having completed the required course in two years. He received the degree of Bachelor of Arts; and three years later was further honored by having conferred upon him the degree of Master of Arts. After being graduated he taught for one year in the high school at Newark, Ohio, and for two

years in the academy and public schools at Marietta, Ohio, and in 1856 was elected superintendent of the local schools, which he served two years.

In 1856 he married Miss Harriet L. Shipman, of Marietta, Ohio, to whom were born four children, all of whom are deceased except Mr. Alfred Dewey Follett, of Marietta, Ohio, a member of the bar. Judge Follett was married a second time in 1875 to Miss Abbie M. Bailey, of Lowell, Mass., to whom was born one son, Edward B. Follett, a judge of the court of common pleas of the seventh judicial district.

Judge Follett was admitted to the bar in 1858, at the time of his death being the oldest member of the Washington county bar association. At the October election in 1883 Judge Follett was elected to the supreme court of Ohio and served there from December 8, 1883, until February 9, 1888. While a member of the supreme court he established a reputation for industry and judicial ability which was recognized by the profession throughout the state. His opinions are found in volumes 42, 43 and 44 Ohio State Reports. He was associated upon the bench with such men as George W. McIlvaine, Selwyn N. Owen, John W. Okey and Franklin J. Dickman and with the present chief justice, William T. Spear, who began his career upon the supreme bench in 1885.

Judge Follett was distinctively a humanitarian. Since 1879, when Governor Bishop sent him as a delegate from Ohio to the National Conference of Charities at Chicago, and Governor Foster the following year to Cleveland, he devoted much time and study toward the improvement of conditions for the criminal and insane. As a member of the

board of state charities he has been largely instrumental in bringing the penal, reformatory and charitable institutions of Ohio to the high standard of present attainment. The new hospital to be erected at Lima for the care of the criminal insane can be directly traced to the influence which Judge Follett has wielded for many years upon the state's policy of caring for its unfortunate. Surely, in this respect he has aided in establishing the Kingdom through this modern expression of the brotherhood of man.

In giving an estimate of the services of Judge Follett we may lay emphasis upon the fact that he was a true friend of education. Himself educated, wisely informed, a teacher, he saw the importance all along the line of lifting education above the bread-and-butter standard. He served on the board of trustees of Marietta college for many years, and upon the Marietta board of education. He also was a charter member of, and until his death a faithful attendant upon, the Marietta Reading Club. Likewise he conceived the law as a profession rather than a business, and never lost interest in the meetings of the Ohio State Bar Association, and in the American Bar Association, of which he was a member and to which, upon important committees, he rendered valuable services.

As a man Judge Follett possessed a strong personality; as a citizen he was ever willing to assume his full share of the burden of public service; as a lawyer he was successful, faithful to his client and honorable.

In the death of Judge Follett the bar has lost a faithful member who possessed true ideals of life

and ethics, and the memory of whom will continue to inspire all those who were so fortunate as to know him and, by association, to catch the spirit of honor, integrity, independence and grit which made him stand out among his fellows.

Respectfully submitted,

HIRAM S. SIBLEY,
J. M. MCGILLIVRAY,
EVAN J. JONES,
JOHN FERGUSON,
FRANK H. SOUTHARD,

Committee appointed by the Supreme Court.

Submitted February 6, 1912.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF OHIO
JANUARY TERM, 1913.

| | | |
|--|---|----------------|
| <p>HON. JOHN A. SHAUCK, CHIEF JUSTICE. HON. JAMES G. JOHNSON, JR., HON. MAURICE H. DONAHUE, HON. R. M. WANAMAKER, HON. OSCAR W. NEWMAN, HON. J. FOSTER WILKIN,</p> | } | <p>JUDGES.</p> |
|--|---|----------------|

COLE *v.* McCLURE, ET AL.

*Rule of supreme court in considering evidence in trial court—
Evidence required to establish will, lost or destroyed—Be-
fore death or insanity of testator—Degree and certainty of
evidence to overcome presumption of revocation.*

1. On review of the record of a trial below, this court will not consider the mere weight of the evidence, but where the law requires in the particular case a higher quality and quantity of evidence than is sufficient in ordinary cases to support a judgment by the preponderance of proof, this court will consider whether the evidence attains to that high degree of probative force and certainty. (*Ford v. Osborne*, 45 Ohio St., 1, followed and approved.)
2. To establish a lost or destroyed will the evidence of its execution and its contents must be clear, strong, positive, free from bias, and convincing beyond a reasonable doubt

Statement of the Case.

3. Where a will has been lost or destroyed before the death of the testator, the law presumes that he revoked it; and where he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became "incapable by reason of insanity to make a will."

(No. 13828—Decided May 6, 1913.)

ERROR to the Circuit Court of Darke county.

May 20, 1911, the probate court of Darke county established and admitted to probate the will of Henry M. Cole, deceased, upon the application of Elmer Cole, John Cole, William Cole and Geo. W. McClure, who alleged that the original will had been lost or destroyed.

The court found that in August, 1904, Henry M. Cole did execute a last will in the mode provided by law, and that he was then of sound mind and memory, but that he became insane in the latter part of the year 1907; that the will became lost or destroyed after the said Henry became insane and that it could not be produced; and then, upon the evidence of papers and testimony submitted, the court established the contents of the will, "as near as can be ascertained," as follows:

"In the name of the Benevolent Father of All, I, Henry M. Cole of the County of Darke and State of Ohio, do hereby make and publish this my last will and testament, to-wit.:

"I give to my beloved wife, Elizabeth Porter Cole, all my property, both real and personal, for and during her natural life, and after her death the same shall go to my brothers and sisters equally or their legal heirs.

Statement of the Case.

"I nominate and appoint my brother-in-law, T. S. Brewer, to be the executor of this my last will.

"In testimony whereof, I have hereunto subscribed my name, this.....day of....., 1904.

"HENRY M. COLE.

"Signed and acknowledged by Henry M. Cole as his last will and testament in our presence, and signed by us in his presence, on the day and year last aforesaid.

"D. W. BOWMAN,

"W. G. STUBBS."

The deceased had no children, but his wife Elizabeth survived him, and he left an estate consisting chiefly of lands.

May 20, 1911, Elizabeth, the widow, filed in the court of common pleas, a petition to contest the probate of the will, alleging that Henry M. Cole died intestate on the 19th of February, 1909, leaving an estate which came to him by purchase and not by descent, devise or deed of gift, and leaving no children or other legal representatives surviving him, but leaving his widow, the plaintiff, his only heir at law; that he left William, John and Elmer Cole, brothers, Belle Brewer, a sister, and George W. McClure, the only child of a deceased sister, surviving him; that the writing established and recorded as the lost or destroyed will of Henry M. Cole is not the last will; that he never executed it; and that he revoked and destroyed it, of his own free volition, prior to his death and prior to the time he became insane, and it was not in existence at the time of his death nor at the time he became incapable of making a will by reason of his in-

Argument for Plaintiff in Error.

sanity; and she prayed that an issue be made, whether said writing so admitted to probate and recorded as the lost or destroyed will of Henry M. Cole be his last will, and that it be set aside.

September 28, 1911, the defendants filed their answer, denying that Henry never executed the alleged will, that he destroyed it prior to his death and to the time he became insane, and averring that it was in existence long after he became incapable by reason of insanity.

The issue thus made was tried to a jury, February 8, 1912, who returned a verdict finding in favor of the will as established by the probate court. Motion for a new trial was entered and overruled, and judgment was entered upon the verdict. Error was prosecuted to the circuit court, and the judgment was affirmed. The plaintiff in error invokes this court to reverse the judgment of both courts below.

Mr. George W. Porter; Messrs. Bickel & Baker; Mr. D. W. Bowman and Mr. William T. Spear, for plaintiff in error.

It may be said that this question involves a consideration of the evidence, and by the provisions of Section 12253, General Code, this court is not required to determine the weight of the evidence, and will not consider it to determine whether the verdict is contrary to law or whether substantial justice has been done. *Finley v. Whitley*, 46 Ohio St., 524.

But we insist that an action to establish a lost will requires more than a mere preponderance. Evidence must be clear, positive and con-

Argument for Plaintiff in Error.

vincing. Whether that rule has been disregarded is a question of law, and this court will look into the evidence for this purpose. *Ford v. Osborne*, 45 Ohio St., 1; *Olinger v. McGuffey*, 55 Ohio St., 661; *Shulters v. City of Toledo* 57 Ohio St., 667; *Stewart v. Gordon*, 60 Ohio St., 170; *Potter v. Potter*, 27 Ohio St., 84; *Missionary Society v. Ely et al.*, 56 Ohio St., 405; *Mears v. Mears*, 15 Ohio St., 90; *Converse et al. v. Starr, Admr., etc., et al.*, 23 Ohio St., 491; *Haynes v. Haynes*, 33 Ohio St., 598; *Bolles v. Harris*, 34 Ohio St., 38; *Dew et al. v. Reid et al.*, 52 Ohio St., 519.

The establishment of a lost will by the probate court is *prima facie* evidence for all purposes, including all that relates to a contest of the same. *Hutson v. Hartley*, 72 Ohio St., 267.

But the only effect of the *prima facie* case is to transfer the burden of proof to the contestants. Whether Judge Cole executed the will in question, and if so, whether lost or destroyed, are open questions to be determined upon all the evidence. *Mears v. Mears*, 15 Ohio St., 102; *Hutson v. Hartley*, 72 Ohio St., 268.

The rule is well established that in such a case the evidence must be strong, positive and convincing. *Southworth v. Adams*, 11 Biss., 256; *Newell v. Homer*, 120 Mass., 277; *In re Johnson's Will*, 40 Conn., 587; *Davis et al. v. Sigourney*, 8 Metc., 487; *Clark v. Turner*, 50 Neb., 290; 23 Am. & Eng. Ency. Law (2 ed.), 147; *In re Lasance*, 5 N. P., 20.

To establish a lost will requires clear, strong and irrefragible evidence, free from suspicion or

Argument for Plaintiff in Error.

doubt in its sources, exact and certain in its conclusions. *Podmore v. Whatton*, 3 Swab. & T., 449, 33 L. J. Prob. N. S., 143, 10 Jur. N. S., 756, 10 L. T. N. S., 754; *Moore v. Whitehouse*, 3 Swab. & T., 567, 11 L. T. N. S., 458, 34 L. J. Pro., 31.

To prove the execution of a lost will by parol evidence only, such evidence should be most clear, satisfactory, stringent and conclusive. *Cutto v. Gilbert*, 9 Mo. P. C., 131; *Buechle's Estate*, 5 Pa. Dist. R., 127; *Clark v. Turner*, 50 Neb., 290, 38 L. R. A., 441; *Estate of Gibson*, 1 N. P., N. S., 552; *Chisholm's Heirs v. Ben*, 7 B. Mon., 408.

A lost will thus established shall be as effectual to pass title to real estate as if the original will had been admitted to probate and record. Section 10548, General Code. The rules should not be less strict therefore than in the case of a lost deed (*Gilmore v. Fitzgerald*, 26 Ohio St., 171; *Slipman v. Telschow*, 4 C. C., N. S., 635; *Diehl v. Stine*, 1 C. C., 520, 1 O. C. D., 287); or to correct a mistake in a deed (*Shulters v. City of Toledo*, 57 Ohio St., 667); or to engraft a trust on an absolute deed by parol. The evidence must, beyond reasonable doubt, prove the existence of the trust, its terms and conditions. *Russell v. Bruer*, 64 Ohio St., 5; *Miller v. Stokely*, 5 Ohio St., 195; *Stall v. Cincinnati*, 16 Ohio St., 169; *Smith v. Neff*, 5 N. P., 496, 5 Dec., 449; 3 Redfield on Wills (3 ed.), 16.

Section 10546, General Code, requires the court to be satisfied of the due execution and contents of the lost will, that it was unrevoked at the death of the testator, and was lost or destroyed since

Argument for Plaintiff in Error.

his death, or after he became insane. To be satisfied means not only that proof must be clear and convincing, but beyond all reasonable doubt. 1 Greenleaf on Evidence (16 ed.), Section 2; *Mo. Pac. Ry. Co. v. Bartlett*, 81 Tex., 42; *Baines v. Ullman*, 71 Tex., 537; *Lessee of Blackburn v. Blackburn*, 8 Ohio, 81; *Russell v. Russell*, 6 C. C., 294, 3 Cir. Dec., 460; *Kelch v. State*, 55 Ohio St., 146; *C. H. & D. Ry. Co. v. Frye*, 80 Ohio St., 289; *Thayer v. Boyle*, 30 Me., 475; 1 Jones on Evidence (1 ed.), 6; 2 Rockel Probate Practice (2 ed.), Sec. 1149; *In re Sinclair's Will*, 5 Ohio St., 290; Section 10543, General Code.

The mere fact that it could not be found subsequent to his death or after he became insane raises a legal presumption that he destroyed it *animo revocandi*. *Behrens v. Behrens*, 47 Ohio St., 323; *Hutson v. Hartley*, 72 Ohio St., 262; *Thomas v. Thomas*, 129 Ia., 160; *Knapp v. Knapp*, 10 N. Y., 277; *Williams v. Miles*, 68 Neb., 463; *Bauskett v. Keitt*, 22 S. Car., 187; *Boyle v. Boyle*, 158 Ill., 228; *Gardner v. Gardner*, 177 Pa. St., 219; *Mann v. Balfour*, 187 Mo., 307; *Sugden v. St. Leonards*, 45 L. J. P., 49, 1 P. D., 154, 34 L. T., 372; 1 Underhill on Wills, Sec. 272; Page on Wills, Sec. 442; 1 Jarman on Wills (6 ed.), 159.

Even though the will was seen in his possession a short time before his death, or before he became insane, the rule is the same. *Collyer v. Collyer*, 110 N. Y., 481; *Estate of Gibson*, 1 N. P., N. S., 552, 6 C. C., N. S., 269, 72 Ohio St., 677; 1 Redfield on Wills (3 ed.), *307; *Behrens v. Behrens*, 47 Ohio St., 323.

Argument for Defendants in Error.

Messrs. Meeker & Gaskill and Messrs. Roberson & Yount, for defendants in error.

Circumstantial evidence alone may be sufficient to justify a finding for the will. Page on Wills, Secs. 436, 437; *Schultz v. Schultz*, 35 N. Y., 653. In most jurisdictions, declarations of the testator are admissible to establish the contents of the lost will in whole or in part. Page on Wills, Sec. 441; 14 Ency. of Evidence, 465, 469; *Muller v. Muller*, 108 Ky., 517; *Clark v. Turner*, 50 Neb., 290; *McDonald v. McDonald*, 142 Ind., 55; *Schnee v. Schnee*, 61 Kans., 647; *In re Hope's Appeal*, 48 Mich., 518; *In re Lambie's Estate*, 97 Mich., 49; *Southworth v. Adams*, 11 Biss., 260; *In re Page*, 118 Ill., 576; *Mann v. Balfour*, 187 Mo., 290.

There was sufficient evidence to sustain the will. 3 Ency. of Evidence, 728.

The contents of a destroyed will may be proved by the testimony of a single witness. *In re Page*, 118 Ill., 576; *Dan v. Brown*, 4 Cow. N. Y., 483; *Welch v. Welch*, 2 T. B. Mon., 83; *Jauncey v. Thorne*, 2 Barb. Ch., 40; *Graham v. O'Fallon*, 4 Mo., 601; *Dickey v. Malechi*, 6 Mo., 177; *Baker v. Dobyns*, 4 Dana, 220; *Wyckoff v. Wyckoff*, 16 N. J. Eq., 401; *Anderson v. Irwin*, 101 Ill., 411; *Varnon v. Varnon*, 67 Mo. App., 634; 14 Ency. of Evidence, 472.

The entire will need not be proven. *In re Patterson*, 155 Cal., 626, 26 L. R. A., N. S., 654; Page on Wills, Sec. 434; *Banning v. Banning*, 12 Ohio St., 437; *Cahill v. Owens*, 3 Dec. Rep., 8; *Jones v. Casler*, 139 Ind., 382; *Tarbell v. Forbes*, 177 Mass., 238; 14 Ency. of Evidence, 470;

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Estate of Kidder, 66 Cal., 487; *In re Johnson's Will*, 40 Conn., 587; *Dickey v. Malechi*, 6 Mo., 177; *Morris v. Swaney*, 7 Heisk., 591.

This will was not revoked. *Wyckoff v. Wyckoff*, 16 N. J. Eq., 401; *In re Page*, 118 Ill., 576; *Dan v. Brown*, 4 Cow. N. Y., 483; *Dickey v. Malechi*, 6 Mo., 177; *Coddington v. Jenner*, 57 N. J. Eq., 528; *Southworth v. Adams*, 11 Biss., 256; *Mann v. Balfour*, 187 Mo., 290; *McDonald v. McDonald*, 142 Ind., 55; *In re Patterson*, 155 Cal., 626; *In re Steinke's Will*, 95 Wis., 121; *Schultz v. Schultz*, 35 N. Y., 653; *Williams v. Miles*, 68 Neb., 463; *Gardner v. Gardner*, 177 Pa. St., 218; *Gardner's Estate*, 164 Pa. St., 420; *Hutson v. Hartley*, 72 Ohio St., 262.

WILKIN, J. The grounds of reversal assigned in plaintiff's brief are: (1) The verdict and judgments below are contrary to law, (2) admissions of incompetent testimony, (3) refusal to give certain instructions of law to the jury, and (4) errors in the general charge.

The first assignment challenges the sufficiency of the evidence produced at the trial, to establish a lost or destroyed will. While this court is not required to weigh the evidence in a case on error, and ordinarily will not do so, yet where relief is sought that can be afforded only upon clear and convincing proof, it will do so for the purpose of determining whether the proof was sufficient. Minshall, J., in *Stewart v. Gordon*, 60 Ohio St., 170, 174, citing *Ford v. Osborne*, 45 Ohio St., 1.

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The standard of evidence in cases like the one at bar has been defined by the courts and text-writers in language somewhat variant but in import the same. For example: The burden of proof is on a party seeking to establish a lost will by parol evidence, to prove its contents by evidence strong, positive and free from doubt. *Newell v. Homer*, 120 Mass., 277; *Davis v. Sigourney*, 8 Metc., 487. The evidence must be clear, certain and conclusive as to its execution and its provisions and conditions. *Russell v. Bruer*, 64 Ohio St., 1; *Miller v. Stokely*, 5 Ohio St., 194; *Clark v. Turner*, 50 Neb., 290, 301. Where a will, *unrevoked*, has been lost or destroyed its contents may be proved by parol, but the fact that it was not revoked must be established by clear and satisfactory proof. *In re Johnson's Will*, 40 Conn., 587.

In the Connecticut case, the court expounds the rule thus: "The court ought to be satisfied, not only that the character and standing of the witness are entirely above suspicion, but that he is capable of expressing with clearness and accuracy the precise meaning of the original will. Not only so, but the circumstances ought to be such as afford no suspicion of the trustworthiness of his recollection, and he should be free from bias or interest. * * * This strictness is requisite in order that courts may be sure that they are giving effect to the will of the deceased and not making a will for him." In *Chisholm's Heirs v. Ben*, 7 B. Mon., 408, Marshall, C. J., declares: "If there be not some stringency in the rule of proof, * * * if a doubtful inference * * *

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is to authorize the establishment of a will, * * * an inducement and opportunity may be offered for setting up spurious wills, the prevention of which is no less the subject of the statute and of the law, than is the frustration of the fraud which would suppress a valid will."

The legal policy of the rule is hinted at in a note to 3 Redfield on Wills (3 ed.), 16, thus: "There are so many motives which might induce the suppression of a will, * * * the possible motives for such an act are so infinitely diversified, that it will always be next to impossible to guard against all possibility of fraud and imposition; * * * and it is safe to act upon that degree of incredulity, in all such matters, which will be sure to expose any suppression of it (the will) from sinister designs. A copy of an alleged lost will is obviously more satisfactory than any amount of testimony dependent upon the memory of witnesses."

"By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt." 1 Greenleaf on Evidence (16 ed.), Sec. 2. "Evidence is said to satisfy the mind when it is such as frees the mind from doubt, suspense or uncertainty." *Baines v. Ullman*, 71 Tex., 537. "To 'satisfy' a body of men of the truth of a disputed fact, requires much more than a preponderance of the evidence. Clear and convincing evidence must be adduced." Bradbury, J., in *Kelch v. State* 55 Ohio St., 146.

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The case made in the transcript before us does not bear the test which the law applies to it. Henry M. Cole was a lawyer and lately a common pleas judge. In 1903 he drew his own will with his own hand. It appears that he made two drafts, possibly three. It is apparent that three witnesses attested these drafts, but if any two of them signed the same draft, the evidence fails to show which draft they signed, for not one of them read the document he signed or heard it read; the nearest identification is that each draft was in the testator's handwriting upon legal-cap paper ruled.

One of these drafts was attested by a Mr. Bowman. No other witness had subscribed to it when he signed it, and he never saw it afterwards. One of the drafts was signed by a Mr. Stubbs, and if it was attested, by whom Stubbs does not remember, but he thinks that the name of Daisy Burtch was not signed. Daisy Burtch signed as a witness to one of the drafts. Another witness had signed that paper, and her best recollection is Mr. Bowman was that other witness.

Now, one Thomas L. Brewer testifies that in the fall of 1904, Judge Cole read his will to him, handed it to him, Brewer read it himself and handed it back to the judge. There was no comment upon it nor discussion about it. He says there were two names subscribed as witnesses—one was Mr. Bowman's, and he thinks Mr. Stubbs' was the other; Daisy Burtch's name was not there, and he is not positive Mr. Stubbs' name was there, but he knows there were two names. He

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never saw the will afterwards nor talked to the judge about it.

Brewer is the only person who assumes to know, or attempts to reproduce, the contents of that will; hence it is upon his recital of the contents that the probate court established the lost or destroyed will, "as near as can be ascertained." Whether the identification of a lost will "*as near as can be ascertained*" from the mere memory of one witness, after the lapse of nine years, is sufficient to establish the will, we need not decide, as a bald proposition.

The result of all the evidence in the record shows, to a fair degree of certainty, that in and about the year 1904, Judge Cole had a will and that he intended to dispose of his estate substantially as found by the probate court. But the questions presented to us are: Is the will which he exhibited to Mr. Brewer the *last* though *lost* will? Or was the will attested by Daisy Burtch, though *lost* also, the *last* will? For we must bear in mind that Mr. Bowman attested but *one* will; *that* is the will Daisy thinks she attested, and *that* is, also, the will which Brewer thinks he read nine years ago; but the will Brewer saw, Brewer is sure, had but *two* witnesses, one being Bowman. Could Stubbs be the other? Neither he nor Brewer says he was.

Now, there is not an iota of evidence in the transcript to prove that either of the two wills survived the collapse of the testator's mental faculties; but there is evidence tending to prove that two years before he was adjudged insane he destroyed the will attested by Bowman and

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Daisy Burtch. The mere statement of these questions which arise on this record, exhibits the uncertainty and unreliability of the evidence submitted to the jury to support the will which was probated.

There is still another question that boldly obtrudes from the case and casts irrepressible doubt upon the verdict. Did Judge Cole have the same intention towards his property and the objects of his bounty at the time he became insane in 1908 as that manifest in the will which Brewer read in 1904? Two or three witnesses, close companions of his, distinctly and positively state that he completely changed his mind within that period, and they give a reasonable and clear account of the natural process of his change of mental attitude in reference to his wife and his property. He decided that the disposition the law would make of his property "was good enough for him." And a witness who was intimately associated with him saw him, in October, 1906, destroy the will attested by Bowman and Miss Burtch. As the positive evidence that Bowman signed but one will is unchallenged and as Brewer is uncertain that Stubbs' name was under the name of Bowman on the will which he saw and as Miss Burtch thinks she signed under Bowman, the logic of these facts is that the will which was probated upon Brewer's evidence was not lost but *destroyed* by the testator according to a sane and natural purpose.

There is a salient fact in the case which impairs the testimony of Mr. Brewer, under the rule which governs the case. He is the husband

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of Belle Brewer, a devisee by the will; they are childless; he manages her property, and at her death he may inherit it; and he is named as executor of the will. He has an interest in the case, and is, therefore, not free from the suspicion of bias. For this reason his testimony, apart from the fallibility of human memory of writings read but once, nine years past, does not supply that high degree of certain and indubitable proof which the rule requires. The facts to which we have adverted show that, not only the proof of the contents of the will but of its identity as another will than the one destroyed in October, 1906, depends upon his testimony; and if the jury could give to his testimony of the contents that degree of credence which satisfies the mind beyond a reasonable doubt, nevertheless his memory of the name of the second witness to the will was confessedly uncertain, and if that witness was Miss Daisy Burtch, then, by all the other proof, the will he saw was destroyed by the testator before he became insane.

The law of this state does not permit a will lost or destroyed to be established unless it was in existence subsequent to the death of the testator or after he became incapable of making a will by reason of insanity. Section 10543, General Code; *In re Sinclair's Will*, 5 Ohio St., 290. When a will once known to exist and to have been in the custody of the testator cannot be found after his decease, or after he became insane, the legal presumption is that it was destroyed by the testator with the intention of revoking it. *Behrens v. Behrens*, 47 Ohio St., 323.

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The proponents of the will call our attention to the testimony of Mr. Stubbs, with whom the testator deposited two packages of envelopes containing papers. He says one was a package of envelopes of the legal size and the other of letter size, and that the testator said, if anything happened to him, Stubbs should turn over the larger package to the testator's legal representatives, and destroy the smaller package. Two or three years later, the testator called for the packages, saying he thought he was the proper person to keep his papers. The testator burned the shorter package, and *part* of that package was letters; he took the longer package away. The witness thought his mental condition was not very good. This was in March or April, 1908. Mr. Brewer testifies that in June, 1906, the testator said to him: "I have deposited *that will* with some other papers with W. G. Stubbs;" and Brewer says that is all the conversation and the only conversation between him and Judge Cole about the will since 1904. It is argued from this evidence that in the long package was *the will* which Brewer had read, and that it was delivered with the papers to Judge Cole in March or April, 1908.

There is other testimony in the transcript to the effect that the judge's mental disturbance began about the holidays; some witnesses say it was noticeable in the fall of 1907. But the physician who visited his invalid wife daily after Christmas, and saw him at the house, on the street and elsewhere, daily, and administered to him for the physical ailment from which he was then suffering, says that no symptoms of mental im-

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pairment appeared before the first of April; and that his mental derangement began shortly before he was adjudged insane, and was very rapid; and this is confirmed by the bankers and other close and intimate friends, who observed no mental defect till two or three weeks before he was adjudged insane, which was done on the 11th day of May, 1908.

If the inference is permissible that the will in question was amongst the papers in the packages and was not in the package which the judge threw into the fire, still it would be pure conjecture to say that he was "incapable of making a will by reason of insanity" at the time he received back the packages. The evidence is too vague, uncertain and conflicting even to overcome the presumption which the law makes, viz.: that the will was destroyed with the sane intention of revoking it.

We remark in passing that there is no evidence directly to the proposition that, at the time Judge Cole received back the package of documents from his lawyer friend Stubbs, his mental derangement was such as to destroy his testamentary capacity. Whether even at the day he was committed, his reason had suffered total eclipse, or if only partial, it was hallucination or mania which affected his conduct only at intervals and in certain directions, leaving his judgment entirely sound in other respects or at lucid periods, is by no means clear. The evidence as a whole is too fragmentary and indefinite, not knit together with sufficient legal precision and compact logic, to satisfy the incredu-

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lous mind which the law requires the triers to have in a case like this.

The conclusion is irresistible that the argument of the proponents is not supported by proof which rises to that degree of certitude and convincing power which is required in the class of cases to which this case belongs; indeed, the evidence would not support this will in a case where only a preponderance of proof is required. We cannot sustain the will unless we overturn a salutary rule of evidence adopted by the courts long ago, to prevent evasion and circumvention of the Statutes of Wills and Descents.

This disposes of the case. It is not necessary to pass upon the other assigned errors. Judgments of the circuit and common pleas courts reversed, and judgment entered here for the plaintiff in error.

Judgments reversed.

SHAUCK, C. J., DONAHUE and WANAMAKER, JJ., concur.

THE WHITE OAK COAL COMPANY v.
RIVOUX, ADMINISTRATRIX.

Automobile owner not liable—For negligence of employe in operating automobile—Unless proven employe at time of accident—Was engaged in employer's business—Presumption of implied authority of bookkeeper.

1. The owner of an automobile is not liable in an action for damages for injuries to or death of a third person caused by the negligence of an employe in the operation of the automobile, unless it is proven that the employe, at the time, was engaged upon his employer's business and acting within the scope of his employment.

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2. The facts that the automobile was owned by the defendant and that the same was negligently operated by an employe do not make a *prima facie* case of negligence against the owner, unless it appears that the employe was driving the automobile with authority, express or implied, of the owner.
3. A bookkeeper or cashier, employed in the office of the company, is not presumed from that fact alone, to have the implied authority to use or operate an automobile purchased and owned by the company for the use and purpose of a traveling salesman.

(No. 13602—Decided May 6, 1913.)

ERROR to the Circuit Court of Hamilton county.

This is an action to recover damages for the death of Paul Francis Rivoux, alleged to have been caused by the negligence of The White Oak Coal Company.

Rivoux, while standing near the curb on the sidewalk on the south side of Fourth street, west of and near Sycamore street, in the city of Cincinnati, was knocked down and injured by an automobile, and died as a result of the injuries. At the time the injuries were received, The White Oak Coal Company was a corporation organized under the laws of the state of West Virginia, and authorized to do business in the state of Ohio. It maintained an office and coal yards in the city of Cincinnati, and this branch of the business was in charge of one William F. Smith, known as the general sales manager of the company.

The action was begun in the superior court of Cincinnati, and the administratrix of the decedent, in her petition, alleged that the automobile was owned by The White Oak Coal Company, and

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that, at the time the injuries were received by the decedent, it was operated by one Charles A. Tribbey, as its employe. She alleged that the company was negligent in allowing Tribbey, who, it was alleged, was incompetent, to operate the automobile; that the same was not properly constructed and equipped; that Tribbey negligently operated it and at an improper rate of speed, and that he failed to keep the automobile at a proper distance from the curb and sidewalk and failed to stop it before it struck decedent, and, in her amendment to the petition, claimed that the company was negligent also in failing to have the tires of the automobile so constructed, covered and protected as to prevent the skidding or slipping of them.

Defendant admitted its corporate existence and authority to do business in Ohio, and denied each and every other allegation contained in the petition and amendment thereto.

The cause was submitted to a jury, and there was evidence introduced by plaintiff establishing the fact that Rivoux was knocked down and injured by the automobile; that he died from the injuries received; that plaintiff was the administratrix of decedent; that he left surviving him a widow and children who would have received pecuniary benefit and assistance from him if he had lived; that the automobile in question was owned by The White Oak Coal Company, having been purchased by it for the use of a traveling salesman; that this salesman had entire charge of the storage in the garage and the repairs; that Tribbey was operating the car at the time of the

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accident and that he was an employee of the company, being employed in the office as bookkeeper or general office clerk.

There was no direct evidence offered by plaintiff tending to prove that Tribbey, at the time he was operating the automobile, was using it for any purpose connected with the business of the company, or that he was using the same with the company's knowledge, permission or consent.

Plaintiff introduced evidence tending to show that Tribbey was negligent in the operation of the car in the particulars mentioned in the petition.

At the close of plaintiff's evidence, a motion to arrest the cause from the jury and to direct a verdict for the defendant was made and overruled.

On behalf of defendant, William F. Smith, the general sales manager of the company, who had control and management of the Cincinnati branch and who employed Tribbey, testified that he (Tribbey) was employed as bookkeeper and cashier; that his duties were to keep the books, take off balances, render bills and take care of the office, and that his duties were absolutely in the office. On cross-examination, Smith admitted that, in his deposition given in the case, he stated that Tribbey had full charge of the office in his (Smith's) absence.

Samuel Dickson, the general manager of the company, testified that Tribbey was cashier and bookkeeper and had no duties to perform outside of the office of the company.

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Tribbey testified that he had intended to use the automobile in the afternoon of the day of the accident on personal business; that he was to drive to Norwood to confer with a man on personal business relating to a lodge of which he was a member; that on the morning of that day he had the automobile brought to the office of the company by an employe of the garage where it was kept; that he was driving the automobile for the purpose of ascertaining whether it needed any repairs before undertaking the trip in the afternoon—the automobile having come in the day before from a several days' trip through Indiana—and that, while driving for that purpose, the automobile skidded and ran into and injured Rivoux. Tribbey admitted that, without permission from the company, he had used the automobile on several occasions prior to this day—on Sundays and on evenings during the week after business hours—for his own pleasure and not in connection with any business of the company. He admitted that, when the manager of the company was not in the office and persons would call and ask for the manager in connection with matters he (Tribbey) felt able to handle, he had stated that he was assistant manager. It appears from the evidence that Smith was in the city on the day of the accident.

At the close of all the evidence in the case, counsel for The White Oak Coal Company renewed its motion to arrest the cause from the jury and for a verdict in its favor, which motion was overruled. A verdict was rendered for plaintiff, a motion for a new trial was presented and

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overruled and judgment rendered on the verdict. Error was prosecuted to the circuit court, and that court affirmed the judgment of the superior court.

This proceeding here is to reverse the judgments of the lower courts.

Messrs. Peck, Shaffer & Peck, for plaintiff in error.

Our proposition is that at the time of the accident Mr. Tribbey was not acting within the scope of his employment and therefore the plaintiff in error was not liable. *Lima Ry. Co. v. Little*, 67 Ohio St., 91; *Limpus v. London Gen. Omnibus Co.*, 1 H. & C., 542, 32 L. J. Ex., 34, 9 Jur. N. S., 333, 7 L. T., 641; *Brown v. Jarvis Engineering Co.*, 166 Mass., 75; *Daniel v. Railroad Co.*, 136 N. Car., 517; *Bard v. Yohn*, 26 Pa. St., 482; *Way v. Powers*, 57 Vt., 135; *McCarthy v. Timmins*, 178 Mass., 378; *Fiske v. Enders*, 73 Conn., 338; *Reaume v. Newcomb*, 124 Mich., 137; *Fish v. Coolidge*, 47 App. Div., 159; *Cavanaugh v. Dinsmore*, 12 Hun, 465; *Thorp v. Minor*, 109 N. Car., 152; *Storey v. Ashton*, L. R., 4 Q. B., 476; *Clark v. Buckmobile Co.*, 107 App. Div., 120; *Stewart v. Baruch*, 103 App. Div., 577; *Branch v. I. & G. N. Ry. Co.*, 92 Tex., 288; *Carl Corper Brew. & Malt. Co. v. Huggins*, 96 Ill. App., 144; *Cunningham v. Castle*, 127 App. Div., 580.

Messrs. Horstman & Horstman, for defendant in error.

The following are some of the cases as to liability of an employer for the act of a servant

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in the course of his employment, and as to presumptions and burden of proof in such cases. *Norris v. Kohler*, 41 N. Y., 42; 1 *Shearman & Redfield on Negligence* (5 ed.), Sec. 158; *Edgeworth v. Wood*, 58 N. J. L., 463; *Maccoun v. N. Y. C. & H. R. Rd. Co.*, 66 Barb., 338; *Cunningham v. Castle*, 127 App. Div., 580; 1 *Thompson on Negligence*, Secs. 613, 614, 615, 616; *Schulte v. Holliday*, 54 Mich., 73; *Stewart v. Baruch*, 103 App. Div., 577; *P. C. C. & St. L. Ry. Co. v. Shields*, 47 Ohio St., 387; *Hayes v. Wilkins*, 194 Mass., 223; *Shamp v. Lambert*, 142 Mo. App., 567; *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky., 380; *Brennan v. Merchant & Co.*, 205 Pa. St., 258; *Kelton v. Fifer*, 26 Pa. Super. Ct., 603; 2 *Thompson on Negligence* (1880), 899; *Deck v. B. & O. Rd. Co.*, 100 Md., 168; *Rahn v. Singer Mfg. Co.*, 26 Fed. Rep., 912, 132 U. S., 518; *Mulvehill v. Bates*, 31 Minn., 364; *Carl Corper Brew. & Malt. Co. v. Huggins*, 96 Ill. App., 144; *Hershinger v. Pa. Rd. Co.*, 25 Pa. Super. Ct., 147; *So. Ohio Rd. Co. v. Morey*, 47 Ohio St., 211; *Barnes v. Kirk Bros. Auto. Co.*, 13 C. C., N. S., 571.

NEWMAN, J. The liability of The White Oak Coal Company is based upon the wrongful and negligent acts of its servant. The company, however, is not liable unless the acts complained of were committed while the servant was acting within the scope of his employment. This is the test and the authorities agree upon this principle. *Lima Ry. Co. v. Little*, 67 Ohio St., 91.

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The company, therefore, is not answerable in damages unless Tribbey, who was operating the automobile at the time of the accident, was acting for the company and in the prosecution of its business. It is averred in the petition that he was operating the automobile as an employe of the company. This was an essential and material averment. All the other material averments of the cause of action were concededly established. The sole claim of plaintiff in error is that Tribbey was not acting within the scope of his employment. It was incumbent upon the plaintiff below to establish, by a preponderance of the evidence, that he was acting within the scope of his employment.

Defendant in error does not question the rule we have announced as to the test of liability, but insists that the question whether or not Tribbey was acting within the scope of his employment was one of fact properly left to the determination of the jury, and that there was evidence tending to establish this fact.

The circuit court, in affirming the judgment of the trial court, say: "The plaintiff below, having shown that the automobile was the property of the defendant and that Tribbey, the driver, was in defendant's employ, the burden was then placed upon defendant to show that, at the time of the accident, Tribbey was acting outside the scope of his employment in a personal enterprise."

Assuming that such a presumption did arise, the "burden," so called, would not require defendant to do more than introduce evidence sufficient to countervail this presumption—it was not

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required to overbalance or outweigh it. *Klunk v. Hocking Valley Ry. Co.*, 74 Ohio St., 125.

But did such a presumption arise from the facts established by plaintiff below? The ownership of the automobile was established, and it was shown that Tribbey was operating the same at the time of the accident and that he was an employe of the company. Is it to be inferred from these facts that Tribbey was acting within the scope of his employment? It was conceded that he was an employe, but was there any evidence offered by plaintiff tending to prove that he was an employe or servant employed in connection with the particular instrument which caused the death of the decedent? Not only was there no evidence in support of such a claim, but on the contrary it appears from the testimony of plaintiff's own witnesses that Tribbey was a cashier or bookkeeper in the office of the company, and that the care, storage and repairs of the automobile were under the control of another employe—a traveling salesman, for whose sole use and purposes the same had been purchased.

Further, there was no evidence offered, on the part of plaintiff, tending to prove that Tribbey was operating the automobile, at the time of the accident, with the knowledge, consent or authority of the company, or that he had ever so operated it.

In addition to the cases cited by defendant in error, we have examined and considered a number of other "automobile cases," and we find that in these cases, at the time of the accident, the automobile was in charge of a servant of the owner—

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a chauffeur in most instances—whose duty it was to operate the automobile, and who was rightly in the possession and use of the same with the consent, knowledge and authority of the owner. In these cases the courts do hold that the establishment of these facts raises the presumption or inference that the person so in charge was acting within the scope of his employment, and it then becomes a question for the jury to determine, upon all the evidence in the case, whether or not this presumption has been overcome.

In the recently decided case of *Reynolds v. Denholm*, 213 Mass., 576, decided February 25, 1913, to which our attention has been called by counsel for defendant in error since the submission of the case at bar, it was admitted that the defendant owned the automobile, and that, at the time of the accident, it was being operated by a chauffeur who was in the defendant's employ. It further appeared that there was evidence tending to show that the chauffeur was employed to drive the automobile for the defendant's family whenever they wanted to use it; that he slept in the house occupied by the defendant and his family, but took his meals at another place, and had his laundry done at still another place; that both his laundry and meals were paid for by defendant as part of his wages; that he was allowed or suffered by the family, without objection, to use the automobile to go to his meals and to get his laundry as he found it convenient, and, while going for his laundry in the automobile, he ran into and injured the plaintiff.

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In that case, the trial court, at the close of all the evidence, directed a verdict for the defendant. The supreme court of Massachusetts held that there was error in this, and that whether the driver was acting within the scope of his employment at the time of the accident was a question for the jury. The case at bar presents an entirely different state of facts, and is clearly distinguishable from the Reynolds case.

In *Cunningham v. Castle*, 127 App. Div., 580, the trial court charged that the fact that the automobile, at the time of the accident, was in the possession of and driven by the chauffeur, with the owner's permission, placed upon the owner the same degree of liability for the chauffeur's negligence, if any, as would have been imposed upon him if the chauffeur were then engaged in the personal business of the defendant. The reviewing court held that this charge was erroneous and that a question of fact was presented upon the evidence, which was whether the chauffeur, at the time of the injuries complained of, was acting within the scope of his employment. But, in that case, it was established that the automobile, at the time of the accident, was being operated by the chauffeur with the knowledge and permission of the owner; in *Stewart v. Baruch*, 103 App. Div., 577, it appeared that the defendant was the owner of the automobile and that the chauffeur who was operating it was in his employ; in *Cooper v. Knight*, 147 S. W. Rep., 349 (Texas), the operator of the automobile was employed by the defendant, and his duties were to go after and deliver automobiles, and, at the time

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of the accident, he was in the discharge of his duties; in *Riley v. Roach*, 168 Mich., 294, the automobile was in charge of the defendant's chauffeur; in *Shamp v. Lambert*, 142 Mo. App., 567, defendant's automobile, at the time of the accident, was in charge of his chauffeur, who was operating the automobile—the very act for which he was employed—and the court say: "The test for the *prima facie* responsibility of the master in such cases is not whether the particular service being performed was specially authorized, but it is whether the act which occasioned the injury was within the scope of the servant's authority in prosecuting the business for which he was employed by the master;" in *Moon v. Matthews*, 227 Pa. St., 488, plaintiff's evidence disclosed the fact that the automobile belonged to the defendant, and that, at the time of the accident, it was being operated by his regular chauffeur. "Under such circumstances," the court say, "the burden was upon the defendant to show that the chauffeur was not acting within the scope of his employment, and upon the business for which he was employed by his master. The test is, whether the act was done in the prosecution of the business in which the servant was employed to assist. If it was, the master is responsible. * * * The present case, as made out by the evidence of the plaintiff, was sufficient to warrant a recovery. Whether or not it was overcome by the testimony offered by the defendant was for the determination of the jury."

In the case at bar, while ownership in the defendant was established, yet there was no evi-

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dence tending to show that, at the time of the accident, the automobile was operated by a person employed or authorized to operate the same.

The facts in all the "automobile cases," to which reference has been made, are easily distinguishable from the facts in the present case, and, in the other cases cited by counsel for defendant in error, it appears not only that the vehicle which caused the damage was owned by the defendant, but also that, at the time of the accident, the same was driven by a person who was either regularly employed for that purpose or who was driving the same with the consent and knowledge of the owner. *Hayes v. Wilkins*, 194 Mass., 223; *Schulte v. Holliday*, 54 Mich., 73; *Rahn v. Singer Manufacturing Co.*, 26 Fed. Rep., 912; *Kelton v. Fifer*, 26 Pa. Super. Ct., 603. The rule announced in these cases is, therefore, not applicable to the case at bar.

There are some authorities which go to the extent of holding that where the plaintiff has suffered injury from the negligent management of a vehicle, it is sufficient *prima facie* evidence that the negligence is imputable to defendant, when it is shown that he is the owner of the vehicle, without even proving affirmatively that the person in charge is the defendant's servant. This doctrine seems to meet with favor in a number of Pennsylvania cases, but in the case of *Lotz v. Hanlon*, 217 Pa. St., 339, in which recovery was sought against the owner of an automobile for injuries resulting to plaintiff, where it was essential to a recovery that it be made to appear that the accident occurred while

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the person in charge of the automobile was using it in the course of his employment and on his master's business, and the only evidence as to that proposition was proof of ownership of the machine in the defendant, the court say: "Ownership of the machine in cases of this character is at best but a scant basis for the inference that was here sought to be derived from it. It is allowed as adequate only when the attending circumstances point to no different conclusion." In that case, evidence was offered by the defendant tending to prove that while the automobile was being operated by the chauffeur, the latter was not operating the same in any business of the master, and the court held that it was the duty of the trial court to direct a verdict for the defendant. Even in Pennsylvania, where such a rule seems to be adhered to, the presumption or inference is so slight that it is held to be the duty of the court to say whether such presumption has been overcome by the other circumstances in the case.

But this court is not in accord with the authorities which hold that a *prima facie* case of negligence is made against a defendant upon the mere showing that he was the owner of the negligently operated automobile. Such a rule would be unjust and would work hardships. An automobile may be in the possession of one who wrongfully appropriates it to his own use, yet, under that doctrine, if such person negligently operates it to the injury of a third person, a *prima facie* case of negligence would be imputed to the owner.

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Nor do we think that proof of the additional fact that the operator was an employe of the owner raises a presumption of negligence against him, unless it appears that the duties of the employe are in connection with the automobile or that he was operating the same with the authority—express or implied—of the owner.

In the case at bar, plaintiff wholly failed to show that the employe had any actual authority to operate the automobile at the time of the accident, and the fact that he was an employe, employed in the capacity of bookkeeper, would not raise the inference that there was an implied authority to operate an automobile purchased for another employe for his use and purposes and in another department or branch of the business, and there being no evidence in support of this essential averment of the petition, namely, that Tribbey was operating the automobile as an employe, the motion of defendant for a directed verdict in its favor, at the close of plaintiff's evidence, should have been sustained.

Plaintiff's case was not strengthened by the evidence offered on the part of defendant. The general sales manager of the company, who employed Tribbey, testified that Tribbey's duties were absolutely in the office, that he was not authorized to use the automobile, and another officer of the company testified along the same lines. Tribbey related the circumstances under which he was using the automobile at the time of the accident. He testified that he was not using it in connection with any business of the company or in the performance of any of his duties as an

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employee; that the company had no knowledge of the fact that he was using it and that on other occasions—on evenings and on Sundays—when he had used it, it was for his own personal business or pleasure, and the use was without the knowledge or consent of the company.

The suggestion is made by defendant in error that, inasmuch as Tribbey, at the time of the accident, was driving the automobile for the purpose of ascertaining whether it needed repairs before he used it for his own personal business and that such an inspection might result in a benefit to his employer, he, therefore, was acting in the interest of the company. There is not even an intimation that this bookkeeper had any authority to inspect this automobile, so that whatever was done by him was done voluntarily. In answer to such a claim, it is necessary only to call attention to the language of the court in *Lima Ry. Co. v. Little*, 67 Ohio St., 91, at page 101: "A master has the right to select and choose his agents and to determine himself, and assign to the servants so selected, their respective duties, and no assumption by an employe of duties not assigned to him will bring those duties within the course or scope of his employment as defined by the master, and when an act is not within the scope of a servant's employment it cannot be within either the express or implied authorization of the master."

For the reasons given, we conclude that defendant's motion, at the close of plaintiff's evidence, for a verdict, which motion was renewed at the close of all the evidence in the case, should

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have been sustained. The judgments of the circuit and superior courts are reversed, and judgment is here rendered for plaintiff in error.

Judgments reversed.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

GIBBS v. VILLAGE OF GIRARD.

Municipalities not insurers of safety of streets and sidewalks—But required to keep same in reasonably safe condition—Right of trial by jury inviolate—Cause for damages presents jury issue, when—Order of judge to direct verdict—Violation of right of jury trial, when—Question of ordinary care.

1. Municipalities are not insurers of the safety of their streets and sidewalks, but are required to exercise ordinary care in keeping their streets and sidewalks in a reasonably safe condition for public travel, and a failure of duty in this respect is negligence.
2. The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, cannot be invaded or violated by either legislative act or judicial order or decree.
3. A cause of action for damages brought against a village for negligence in the care of its sidewalks, by reason of which it is claimed plaintiff was injured, presents a jury issue if there is some evidence tending to prove every essential fact necessary to entitle plaintiff to recover; and an order of the trial judge at the close of the plaintiff's case directing a verdict in favor of defendant over the objection of such plaintiff is a denial and violation of the right of trial by jury and therefore reversible error.
4. What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the determination of the jury under all the evidence and proper instructions by the court appropriate to the particular circumstances of each case and the issues thereof.

(No. 13045—Decided May 6, 1913.)

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ERROR to the Circuit Court of Trumbull county.

The plaintiff filed a petition in the court of common pleas of Trumbull county charging the village of Girard with negligence in the care of its sidewalks in the following particulars, to-wit: That on or about the 7th of August, 1909, about the hour of nine o'clock P. M., she was going north on the westerly sidewalk on a street in said village known as State street; that the sidewalk in front of the Stuttler lot was paved with flagstones; that the sidewalk in front of the next northerly lot, known as the Jones lot, was paved with cement; that at the point where the flagstone and cement joined, there was about a two-inch sudden fall or drop causing an offset; that this had been caused by a sewer underneath the cement sidewalk undermining the same and causing the same to fall or depress; that this defective condition had existed for a period of several years; that it was well known to the village or by the exercise of ordinary care should have been known to said village; that it was not known to the plaintiff; that she was a stranger in the village and to the sidewalk; that it was dark and unlighted at the point of the sidewalk where the injury occurred; that such sidewalk at that point was one of the most frequented and traveled parts of said village and but a short distance from the business center of the village; that in coming upon such sidewalk at such point the toe of her shoe became caught in the lower part of said walk, whereby she was suddenly and without warning thrown to the ground and sustained

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serious injury; that she was all the while in the exercise of ordinary care; that the defect in the sidewalk where such injury occurred was not discernible to her by reason of the darkness aforesaid.

The village of Girard answered denying all negligence and charging further that if the plaintiff was injured it was by reason of her own negligence directly or contributing to such negligence as might be found against the village.

At the close of the plaintiff's case a motion to direct a verdict in favor of the defendant village was sustained by the trial judge.

Error was prosecuted to the circuit court, which affirmed the judgment below. Error is now prosecuted to the supreme court to reverse the judgments of both the common pleas and circuit courts.

Messrs. Pierson & Casey and Mr. Charles Koonce, Jr., for plaintiff in error.

The court erred in sustaining the motion of the defendant to direct a verdict in its favor. *Village of Cardington v. Admr. of Fredericks*, 46 Ohio St., 446; 15 Am. & Eng. Ency. Law (2 ed.), 440, 441; 1 Shearman & Redfield on Negligence, Sec. 350; *Goodfellow v. New York*, 100 N. Y., 15; *Bullock v. New York*, 99 N. Y., 654; *Heckman v. Evenson*, 7 N. Dak., 173; *Williams v. West Bay City*, 126 Mich., 156; *City of Lawrence v. Littell*, 9 Kans. App., 130; *City of Osage v. Brown*, 27 Kans., 130; *Laurie v. City of Ballard*, 25 Wash., 127; *Keen v. Mayor, etc., of Havre de Grace*, 93 Md., 34; *Dickerman v. Weeks*, 108 App. Div.,

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257; *Corson v. New York*, 118 App. Div., 679; *District of Columbia v. Arms*, 107 U. S., 519; *Chicago & N. W. Ry. Co. v. Netolicky*, 67 Fed. Rep., 672, 14 C. C. A., 615; *Glantz v. South Bend*, 106 Ind., 305, 6 N. E. Rep., 632; *Urtel v. City of Flint*, 122 Mich., 65, 80 N. W. Rep., 991; *Baxter v. City of Cedar Rapids*, 103 Ia., 599, 72 N. W. Rep., 790; *City of Aurora v. Cox*, 43 Neb., 727, 62 N. W. Rep., 66; *Wilkins v. City of Flint*, 128 Mich., 262, 87 N. W. Rep., 195; *Wedderburn v. City of Detroit*, 144 Mich., 684, 108 N. W. Rep., 102; *Lamb v. City of Worcester*, 177 Mass., 82; *Welsh v. Inhabitants of Amesbury*, 170 Mass., 437; *Town of Watertown v. Greaves*, 50 C. C. A., 172, 112 Fed. Rep., 183.

Mr. Wade R. Deemer and *Mr. G. P. Giltner*,
for defendant in error.

The court did not err in sustaining the motion of defendant to direct a verdict in its favor. *City of Dayton v. Glaser*, 76 Ohio St., 471; *Buswell on Personal Injuries* (2 ed.), Secs. 53, 168; *Chase v. Cleveland*, 44 Ohio St., 514; *City of Cincinnati v. Fleischer*, 63 Ohio St., 234; *Durbin v. Napoleon*, 11 O. C. D., 584; *Kaweicka v. Superior*, 136 Wis., 613; *Young v. Citz. St. Ry. Co.*, 148 Ind., 54; *Village of Leipsic v. Gerdeman*, 68 Ohio St., 7; *Town of Gosport v. Evans*, 112 Ind., 133; *Bennett v. St. Joseph*, 146 Mich., 382; *Weisse v. Detroit*, 105 Mich., 482; *Yotter v. Detroit*, 107 Mich., 4; *Gastel v. New York*, 194 N. Y., 15; *Hamilton v. Buffalo*, 173 N. Y., 72; *Butler v. Village of Oxford*, 186 N. Y., 444;

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Corson v. New York, 78 App. Div., 481; *City of Richmond v. Schonberger*, 111 Va., 168, 68 S. E. Rep., 284; *Marvin v. New Bedford*, 158 Mass., 464; *George v. Haverhill*, 110 Mass., 506.

WANAMAKER, J. The sole, single question is—Did the trial court err by directing a verdict at the close of plaintiff's side of the case and the circuit court likewise err in affirming the trial court's judgment?

It will be refreshing and instructive to look at some of the ancient landmarks of America as to trial by jury.

Article VII of our federal constitution reads: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 8 of Article VIII, Bill of Rights, Constitution of the state of Ohio, 1802, reads: "That the right of trial by jury shall be inviolate."

Section 5 of Article I, Bill of Rights, Constitution of 1851, reads: "The right of trial by jury shall be inviolate."

Judge Ranney, in *Work v. The State of Ohio*, 2 Ohio St., 297, uses this language: "What, then, is this right? It is nowhere defined or described in the constitution. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind.

* * * The constitution furnishes no answer, nor was it necessary that it should. If ages of un-

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interrupted use can give significance to language, the right of jury trial and the *habeas corpus* stand as representatives of ideas as certain and definite as any other in the whole range of legal learning.

"The institution of the jury referred to in our constitution, and its benefits secured to every person accused of crime, is precisely the same in every substantial respect as that recognized in the great charter and its benefits secured to the freemen of England, and again and again acknowledged in fundamental compacts as the great safeguard of life, liberty, and property; the same, brought to this continent by our forefathers, and perseveringly claimed as their birthright, in every contest with arbitrary power, and finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them, in the eyes of mankind, in waging the contest which resulted in independence. Nor did their affection for it then diminish or cool. They made it a corner stone in erecting the state governments; and after the adoption of the federal constitution, without a provision securing it, they did not rest satisfied, until they had proposed and carried an amendment."

Judge Ranney quotes with special favor the language of Blackstone, as follows: "Upon these accounts, the trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. And if it has so great an advantage over others in regulating civil property, how much must that advantage be heightened when it is applied to criminal cases."

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Lest Judge Ranney's views upon the trial by jury be misapprehended because the foregoing case was a criminal one, we quote his views in *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St., 644. In this case, a motion to direct a verdict, or for non-suit, was made and sustained and the questions involved were reviewed by the supreme court, Judge Ranney rendering the opinion: "The law of every case, in whatever form presented, belongs to the court; and it is not only the right of the judge, but his solemn duty, to decide and apply it. He must determine the legal requisites to the right of action, and the admissibility of the evidence offered to sustain it. When all the evidence offered by the plaintiff has been given, and a motion for a non-suit is interposed, a *question of law* is presented, whether the evidence before the jury *tends* to prove all the facts involved in the right of action and put in issue by the pleadings. In deciding this question, no finding of facts by the court is required, and no weighing of the evidence is permitted. All that the evidence in any degree *tends* to prove, must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduces to establish, must be taken as fully established.

"The motion involves not only an admission of the truth of the evidence, but the existence of all the facts which the evidence conduces to prove. It thus concedes to the plaintiff everything that the jury could possibly find in his favor, and leaves nothing but the question whether, as a matter of law, each fact indispensable to the right of

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action has been supported by some evidence. If it has, no matter how slight it may have been, the motion must be denied; *because it is the right of the party to have the weight and sufficiency of his evidence passed upon by the jury—a right of which he can not be deprived, and involving an exercise of power for which, without his consent, the court is incompetent.*”

On the same page, and in the same connection, Judge Ranney further says: “But where he has given *no* evidence to establish a fact, without which the law does not permit a recovery, he has nothing to submit to the jury; and the determination of the court, that the fact constitutes an essential element in the right of action, necessarily ends the case.”

The importance of this question will allow a further quotation from Judge Ranney’s very excellent opinion: “Our conclusions upon this subject cannot be better stated than in the clear and explicit language of one of the learned judges of the court below: ‘Wherever there is any evidence, however slight, tending to prove the facts essential to make out a case for the plaintiff, a non-suit cannot be properly ordered; it is in no case a question as to the weight, but as to the relevancy of the testimony. If the testimony tends to prove a *prima facie* case for the plaintiff, a non-suit cannot be properly ordered.’”

It is manifest that this doctrine is the one legally known as the scintilla rule. This opinion of Judge Ranney’s was reaffirmed in *Dick v. Railroad Co.*, 38 Ohio St., 389. Syllabus: “A motion to arrest the testimony from the jury, and render

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a judgment against the party on whom the burden of proof rests, involves an admission of all the facts which the evidence tends to prove, and presents only a question of law for the court; but if there is evidence tending to prove each material fact put in issue, and indispensable to a recovery, *it should be submitted to the jury under proper instructions.*"

The same doctrine was announced and upheld by Judge Spear, in *Cincinnati Street Ry. Co. v. Snell*, 54 Ohio St., 197, citing the case of *Ellis & Morton v. Ohio Life Ins. & Trust Co.*, 4 Ohio St., 627.

Judge Spear says: "The motion involved an admission of all the facts which the evidence in any degree tended to prove, and presented only a question of law, whether each fact indispensable to the right of action, and put in issue by the pleadings, had been supported by some evidence. If it had been, no matter how slight the evidence, the motion should have been denied, because it was the right of the plaintiff to have the weight and sufficiency of his evidence passed upon by the jury. But if he had failed to give evidence tending to establish any fact without which the law would not permit a recovery, he had nothing to submit to the jury, and a question of law only remained. We are aware that this rule is much criticised, and plausible arguments against its reasonableness have been adduced, but it has been followed uniformly, and should be applied until definitely overruled, or changed by legislation."

In *First National Bank v. Hayes & Sons*, 64 Ohio St., 101, Judge Minshall, delivering the opinion of the court, uses this language: "The

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case was tried to a jury, and at the close of the evidence on both sides, the plaintiff moved the court to instruct the jury to return a verdict in its favor, and the defendants made a like motion for a verdict in their favor. On consideration the court instructed the jury to return a verdict for the defendants, to which the plaintiff excepted, but did not request the court to submit the case to the jury for its determination on the evidence. The first question that arises is whether this was error, though there may have been some evidence tending to support the plaintiff's case. If no motion had been made by the plaintiff and there was any evidence tending to support its case, it would have had the undoubted right to have had the same submitted to the jury, and it would have been error in the court to direct a verdict for the defendants. Of this there can be no question."

Numerous other citations might be made from both supreme and circuit court cases, tracing the history and development and constant reaffirmance of this doctrine, but time and space forbid. We content ourselves merely with the brief statement that we heartily reaffirm the doctrine.

To hold otherwise would not only commit but permit, in a multitude of cases, a sinister and indirect invasion and usurpation of the right of trial by jury. A legislative act impairing it would be clearly unconstitutional. How, then, can a judicial order or judgment that indirectly but most effectually defeats the right of trial by jury, be otherwise than an invasion and violation of a party's rights? The right is merely to have questions of fact determined in the first instance

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by a jury under proper instructions of the court appropriate to the issues and the evidence. If the jury shall err, the trial judge may thereafter correct the error, and if he fail to correct it, the higher courts are still available.

We come now to examine the question as to whether or not there was some evidence touching or tending to prove each and every material fact necessary to entitle the plaintiff to recover.

The three grounds upon which the trial judge directed the verdict were as follows: First, that the plaintiff by her own testimony has raised a presumption of contributory negligence on her part; second, that the testimony in this case fails to show any express or implied notice to this defendant of the condition of the sidewalk; third, that the defect in the sidewalk as shown by the testimony is as a matter of law not such a defect that plaintiff can recover, and that the court is authorized as a matter of law to say that the village was not negligent in permitting such a defect in the street.

A mere statement of these three questions of fact, the determination of which was squarely and directly taken away from the jury, shows the length to which trial courts may go under the guise of law in defeating the right of trial by jury. Ordinarily, the question of negligence, if not one of fact, is of mixed law and fact, and is a proper issue for the determination of the jury. If negligence raises a proper issue for the determination of the jury, certainly contributory negligence must likewise raise a proper issue for the determination of the jury. It will not do to say that the

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negligence of the defendant was a question for the jury, but that the negligence of the plaintiff with respect to the same transaction, whether you call it contributory or not, was a question for the court. They both involve the question of want of ordinary care in the particular situation and both must be determined by substantially the same rules of evidence.

In this particular case, however, the plaintiff is walking along in the usual and ordinary way on a perfectly flat, smooth, flagstone sidewalk, when she comes to this point where there is a sudden and immediate two-inch drop. At this point, she testifies: "And I stepped on the walk it seems to me it was higher where my heel was and my toe went down low and when I stepped up my toe went in this place and it threw me this way and I struck on this hip and wrenched this ankle and limb."

This was about 8:30 in the evening, in the month of August, 1909. The plaintiff was a comparative stranger to the town, and an entire stranger to this walk. The night was sufficiently dark and the arc light far enough removed so that the defect in the sidewalk was not discernible at the time to the plaintiff. Walking along in her usual way under these circumstances she fell and was injured by reason of the condition of this walk.

How then can it be said as a matter of law that she was guilty of contributory negligence?

As to the second proposition, that there was no notice express or implied to the defendant of the condition of the sidewalk, the evidence showed

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that the sidewalk had been practically in this condition for more than two years; that three or four other accidents, not so serious, however, but accidents, had occurred at this particular place. Can it be consistently said that these facts furnish no evidence whatsoever as to constructive notice or implied notice to the defendant as to the condition of this walk? The statement of the question suggests its own proper answer.

Third, that the defect in the sidewalk, as shown by the testimony, is, as a matter of law, not such a defect that the plaintiff can recover. If the court may say, as a matter of law, that a two-inch defect is not a defect, it may say that a four-inch defect, or a six or ten-inch defect, is not a defect upon which to predicate an action for negligence. For the purpose of this motion, the defect must be admitted, and it was a question for the jury to say whether or not the continuation of that defect for two years or more, under all the circumstances of the case, was or was not want of ordinary care upon the part of the village to keep its streets in a reasonably safe condition, and whether or not the village knew or ought to have known of that fact. The very fact that the defect was undisputed was some evidence tending to show negligence, which, together with all the other facts and circumstances in the case, certainly furnishes an issue for the determination of the jury.

True, many cases can be cited from other states holding the contrary doctrine. In some the court has directed a verdict where there was a defect or

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depression in streets or sidewalks of two inches, three inches, four inches, five inches, six inches, and even more, holding, in such cases, that the defect was a matter of law, assuming, indeed, to make an exception in cases of negligence against municipalities and applying a different rule than is applied in negligence cases against private corporations. Obviously, this is not a mathematical question to be decided upon some mathematical or lineal standard; but, on the contrary, it is an ethical question. There is no reason why an exception should be made in favor of municipal corporations, the citizens and taxpayers of which are usually well represented on the jury and always keen and anxious to protect the rights of their own municipality.

Special attention has been invited to the case of *City of Dayton v. Glaser*, 76 Ohio St., 471, as sustaining the doctrine in support of the judgments below. We approve the rule laid down in the syllabus, which is not at variance with any doctrine announced here; but, so far as the written opinion approves the doctrine laid down in *Beltz v. City of Yonkers*, 148 N. Y., 67; *Grant v. Town of Enfield*, 11 N. Y. App. Div., 358; and *Morgan v. City of Lewiston*, 91 Me., 566, the same is disapproved.

So long as the trial by jury is a part of our system of jurisprudence its constitutional integrity and importance should be jealously safeguarded. The right of trial by jury should be as inviolate in the working of our courts as it is in the wording of our constitutions.

Syllabus.

The judgments below are reversed and the cause is remanded to the court of common pleas for a new trial and such other proceedings as are required by law.

Reversed.

JOHNSON, DONAHUE, NEWMAN and WILKIN,
JJ., concur.

EDMONDSON, AUDITOR, ET AL. v. DECKEBACH.

Contract by county with person—To search for concealed and unassessed taxable realty—Omitted from tax duplicate—Employed searcher to receive percentage of taxes recovered—Searcher not entitled to compensation for taxes collected—In and for time subsequent to expiration of contract, when—Services rendered after life of contract gratuitous, when—Tax inquisitor—Law of contracts.

1. A contract made by a county through its proper officers, employing a person to search for and discover concealed and unassessed taxable real estate that had been omitted from the assessment rolls and tax duplicate of that county, upon which property the taxes "are lawfully due and unpaid," which contract provides that the person so employed is to receive for his services a certain percentage of the taxes actually recovered by the county treasurer from assessments on such omitted real estate and further provides that the compensation agreed upon "shall not be deemed due and owing until the taxes upon such omitted real estate have actually been paid into the county treasury," does not authorize the payment of any compensation to such person so employed out of taxes levied and collected on this real estate at and for a time subsequent to the expiration of the term of the contract.
2. Such contract, by its express terms, relates to and comprehends only the taxes that then are lawfully due and unpaid upon such omitted real estate, and these taxes not only measure the amount of compensation to be paid him under this contract, but also provide the only fund out of which he can be paid for such services.

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3. Where, under such contract, omitted property is discovered by the person so employed, and the taxes then due, with penalties, are placed upon the tax duplicate against this property, but these taxes and penalties are never actually paid into the county treasury, the reasons for failure to collect the same are unimportant. In such case, under the express terms of this contract, there is nothing due and owing to the person so employed for his services in securing these taxes and penalties to be placed upon the tax duplicate, and his right to compensation out of these taxes, had they been collected, can not be transferred to other taxes subsequently collected upon the same property.
4. The right of the person so employed to compensation for his services, under the terms of this contract, is confined to the services rendered by him during the life of the contract, and any services rendered by him at a later time, by which he induced a subsequent auditor to make use of the facts discovered by him and place the property on the tax duplicate for a period of years long subsequent to the termination of the contract, must be held to be gratuitous and do not entitle him to be paid out of the taxes collected for these subsequent years for any services rendered during the term of the contract.

(No. 13903—Decided May 6, 1913.)

ERROR to the Circuit Court of Hamilton county.

On the 22nd day of January, 1912, George O. Deckebach filed in the superior court of Cincinnati a petition against the plaintiffs in error, averring, among other things, that on the 30th day of April, 1887, he entered into a contract with Herman Goesling, John Zumstein and William Anthony, who then constituted the board of county commissioners of Hamilton county, Fred Raine, auditor, and Frank Ratterman, treasurer, of said county, which contract is as follows:

“This agreement made and entered into this thirtieth day of April, A. D. 1887, by and between Herman Goesling, John Zumstein and William

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Anthony, members of the board of county commissioners for Hamilton county, Ohio; Frederick Raine, auditor, and Frank Ratterman, treasurer, of Hamilton county, Ohio (or a majority of said officers) of the first part, and George O. Deckebach of the city of Cincinnati, Ohio, of the second part.

"Witnesseth, that by this contract the party of the second part is hereby employed and appointed by the party of the first part, to diligently search for and discover in a lawful manner, omitted, concealed and unassessed taxable real estate, that has been omitted from the assessment rolls and tax duplicates of Hamilton county, Ohio, and upon which said property the taxes are lawfully due and unpaid. Said party of the second part shall honestly and faithfully report his said discoveries to the county auditor, with such facts and evidence connected therewith that will enable said auditor to lawfully subject said real estate to taxation, and enable the treasurer to collect taxes thereon.

"For and in consideration of the above services being done and performed by the party of the second part, as compensation therefor the party of the first part covenant and agree to pay said party of the second part, a sum equal to twenty-five per cent. of the taxes actually recovered by the treasurer of Hamilton county, Ohio, from the assessment of such omitted real estate and by reason of the discoveries and reports of said party of the second part, provided that said sum of twenty-five per cent. nor any part thereof shall be deemed due and owing until the taxes on such

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omitted real estate aforesaid has actually been paid into the county treasury. Payments shall be made by the county commissioners upon the certificate of the county treasurer showing the taxes to have been paid into the treasury in compliance with this contract.

"This contract shall continue and be in force for the term of two years from the second day of May, 1887.

"Witness our hands and seals in duplicate this thirtieth day of April, 1887."

That on or about the 15th day of February, 1888, plaintiff, acting under this contract and in pursuance thereof, furnished to Fred Raine, auditor of Hamilton county, the facts and evidence necessary to authorize him to subject to taxation certain tracts of land in the city of Cincinnati, owned by Cincinnati but leased to private corporations and individuals and not used for public purposes, and requested said auditor to charge the same as taxable, which property, prior to this date, had entirely escaped taxation and was omitted from the tax duplicate; that, thereupon, said Raine, auditor, did place said omitted property on the tax duplicate for the years 1881 to 1887, inclusive, charging said property and taxes against the lessees of said property, as in his judgment it was proper so to do, in accordance with the provisions of Section 2733, Revised Statutes; that, thereupon, said lessees brought an action to restrain the county auditor and county treasurer from the collection of the taxes so charged; that, upon the trial of said cause in the common pleas court of Hamilton county, the injunction was dissolved and the petition

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dismissed; that an appeal was taken to the circuit court of that county, and that court entered a perpetual injunction against the auditor and treasurer enjoining the collection of these taxes; that this judgment of the circuit court was affirmed by the supreme court; that plaintiff employed counsel prior to the furnishing of the facts and evidence to the auditor to examine and determine the question as to the taxability of said property, and also to take part in the preparation of the defense of the auditor and treasurer in the injunction suit in the common pleas, circuit and supreme courts, and furnish the facts and evidence necessary to sustain the contention of the county officials that said property was taxable.

That after this case of *Zumstein, Treasurer, v. The Consolidated Coal & Mining Company* was decided by the supreme court, this plaintiff requested the then auditor of Hamilton county to use the facts and evidence furnished by him during the existence of his contract, and charge said property and taxes against the city of Cincinnati, and continued to urge upon each subsequent auditor so to charge said taxes against the city of Cincinnati, but the same was not done until the 13th day of January, 1905, when Eugene L. Lewis, auditor, at the request of the plaintiff, did charge said omitted property and taxes on the tax duplicate against the city of Cincinnati, using the facts and evidence furnished by plaintiff in 1888 to the then auditor of Hamilton county; that this property was still under lease, six of the tenants being the same as in 1888; that in every lease made subsequent to February, 1888, except in one instance, the lease

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provided for the payment of taxes, if any, by the lessee.

That after said property had been so placed on the tax duplicates, the city of Cincinnati brought an action against the auditor and treasurer of Hamilton county to enjoin them from collecting the same; that such proceedings were had in that cause in the common pleas, circuit and supreme courts that resulted in a final judgment refusing injunction and dismissing the city's petition; that this plaintiff also employed counsel to urge upon the different auditors their right and duty to charge said property and taxes against the city of Cincinnati, and employed counsel to take part in the preparation of the defense of the injunction suit in all of said courts; that plaintiff furnished the facts and evidence necessary in the hearing of said cases, being the same facts and evidence furnished by him to Raine, auditor, in 1888; that afterwards the city of Cincinnati paid to the county treasurer the taxes charged against this omitted property, amounting to \$74,369.53; that, notwithstanding the payment of these taxes by the city of Cincinnati, the county auditor, treasurer and commissioners decline to recognize the right of plaintiff to compensation out of the same, in pursuance with the terms of the statute and his contract, and threaten to make distribution of the money paid in as taxes among the different funds to which these taxes are to be apportioned without paying any part thereof to this plaintiff; that if they are permitted to make such distribution, this plaintiff will be remediless and totally unable to recover compensation due him under his contract.

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Plaintiff asks for an injunction restraining the county treasurer and auditor from distributing these taxes among the different funds without reserving twenty-five per cent. thereof to pay the compensation of this plaintiff, and that upon final hearing the county treasurer be ordered to certify to the county commissioners that the taxes have been paid into said treasury in compliance with the contract of said plaintiff; that the county commissioners be ordered to allow the claim of plaintiff, and for such other and further relief to which plaintiff may be entitled either in law or equity.

To this petition the defendants filed the following demurrer: First, that the pretended legislation, upon which the plaintiff's action is based, is in violation of Section 26 of Article II of the Constitution of the state of Ohio, and is unconstitutional and void. Second, the petition does not state facts sufficient to constitute a cause of action against these defendants. This demurrer was overruled by the superior court of Cincinnati, and the defendants, not desiring to plead further, judgment was entered against them, as prayed in the petition. The defendants then prosecuted error in the circuit court of Hamilton county, and that court affirmed the judgment of the superior court. This proceeding in error is now prosecuted in this court to reverse the judgments of both the circuit and superior courts.

Mr. Thomas L. Pogue, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Charles A. Groom*, assistant prosecuting attorneys, for plaintiffs in error.

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Mr. Rufus B. Smith; Mr. John J. Weitzel and Mr. A. W. Bruck, for defendant in error.

DONAHUE, J. It is admitted that the statute authorizing the county commissioners, auditor and treasurer to enter into this contract with plaintiff is unconstitutional, but it is insisted, on the part of defendant in error, that legislation of this character had heretofore been held constitutional by this court, that he relied upon such holding in making his contract and performing the services thereunder, and that, therefore, his claim comes within the doctrine announced in the case of *Thomas v. State, ex rel.*, 76 Ohio St., 341.

Our attention is called to the case of *State, ex rel., v. Crites, Auditor*, 48 Ohio St., 142, wherein the court held similar legislation constitutional. That case was decided February 24, 1891, and, as plaintiff's contract was made long before that time, it can avail him but little in support of his contention.

The case of *State, ex rel., v. Cappeller*, 39 Ohio St., 207, is also cited by counsel for defendant in error, and it does appear that in that case this court held Section 1 of the act of April 14, 1880 (77 O. L., 205), constitutional, but it does not appear that that act had anything to do with the question in that case. In the August settlement, 1881, the county auditor sought to withhold from the state its share of costs and counsel fees in suits against the auditor and treasurer in relation to their duty in respect to the collection of taxes, and also certain amounts paid by the county to local collectors for collecting delinquent personal

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taxes for the years 1869 to 1876, inclusive. Section 1 of the act of April 14, 1880 (77 O. L., 205), applied only to persons employed to ascertain and furnish to the county auditor facts and evidence necessary to authorize him to subject to taxation property improperly omitted therefrom prior to the passage of that act, and did not relate to the employment of persons to assist in the collection of delinquent taxes already charged on the tax duplicate.

The determination of the foregoing question, however, is wholly unimportant to the disposition of the case at bar. Conceding that the defendant in error, when he made and entered into this contract with the officials of Hamilton county, had the right to rely upon the judgment of this court in the case of *State, ex rel., v. Cappeller, supra*, and that, having done so, he should now be protected under the doctrine announced in the case of *Thomas v. State, ex rel.*, 76 Ohio St., 341, it does not necessarily follow that this defendant in error is entitled to be paid the compensation provided for in his contract out of taxes other than the taxes due and unpaid at the time the services were performed.

An analysis of this contract shows that plaintiff was employed and appointed by the commissioners, auditor and treasurer of Hamilton county "to diligently search for and discover in a lawful manner, omitted, concealed and unassessed taxable real estate that has been omitted from the assessment rolls and tax duplicate of Hamilton county, Ohio, and upon which said property the taxes are lawfully due and unpaid." Out of

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these taxes, when collected, he was to be paid twenty-five per cent. of the total amount actually recovered by the treasurer of Hamilton county, Ohio, from the assessment of such omitted real estate, and it was specially provided in the contract that "*nor any part thereof shall be deemed due and owing until the taxes on such omitted real estate aforesaid have actually been paid into the county treasury.*" This contract related to and comprehended only the conditions then existing in Hamilton county, and not with conditions that might exist in 1905. By the clear terms of the contract, the taxes out of which he was to be paid for his services were the taxes that were then lawfully due and unpaid, and not out of taxes that might become lawfully due and unpaid twenty years thereafter. He was not entitled to project this contract to include taxes that might accrue beyond the time limited for its termination. The contract was to continue for two years from the 2nd day of May, 1887, and if, by reason of his services, any of the taxes then lawfully due and unpaid upon omitted real estate, or any taxes that might become lawfully due and unpaid upon omitted real estate during the term of his contract, should be paid into the county treasury, either before or after the expiration of his contract, he would be entitled out of those taxes, and no other, to be paid the compensation provided in the contract.

It is true that his petition does not state for what years the auditor, in 1905, placed this omitted real estate upon the tax duplicate, but, under the law, it could not have been any of the years pre-

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ceding the date of the termination of this contract. According to the averments of his petition, he furnished this information to the auditor on the 15th day of February, 1888, and out of whatever taxes were then lawfully due and unpaid on omitted real property prior to that date and were actually procured to be paid into the county treasury, he would be entitled by the terms of his contract to be compensated, but not out of the taxes paid upon that same property for a later period. Through a mistake of the taxing officer, this omitted real estate, discovered by defendant in error, was placed upon the tax duplicate in the names of persons who were not liable for the payment of the same, and by reason of this error, these taxes, which he had been instrumental in having placed upon the tax duplicate, never were collected and never can be collected, and though the failure to collect the same was, probably, through no fault of his, yet under the terms of his contract, he was to be paid only out of these taxes, and cannot, therefore, be paid out of any other.

The services that he was to render the county, under this contract, so far as this property is concerned, ended with the disclosures he made to the auditor on the 5th day of February, 1888. He does aver in his petition that he furnished evidence in the trial of the several cases, that he employed counsel to assist in the litigation, and that, from time to time, he urged upon the various auditors to place this property upon the tax duplicate for years subsequent to 1888. These services were not contemplated in this contract. They

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were not the services for which he was to be paid. They were rendered long after the expiration of his contract. These services, so far as the contract is concerned, were voluntary on his part, and cannot affect his legal rights under the contract. When he furnished this information to the auditor in February, 1888, he was through with the transaction, except that when collected he was to be paid for this service out of the taxes that were then placed upon the tax duplicate by the county auditor in pursuance of the information furnished to him by defendant in error. That was the only fund out of which he could be paid. The contract specifically so provided. That fund never came into the county treasury. These taxes never were collected and never will be. They are forever lost, not only to the county, but to all persons interested therein, and while it is unfortunate that this defendant in error should lose his compensation, yet it is equally unfortunate that the county must lose the seventy-five per cent. of these taxes that should have gone into the county treasury, and it would be still more unfortunate for the county if, in addition to this loss, it is compelled to pay out of the taxes accruing many years later the defendant in error's proportion of the original loss.

It is urged that the taxes now collected by the county on this same property would never have been collected but for the services of this defendant in error. That is perhaps true, and that was in contemplation at the time the contract was made. It was undoubtedly the intention of the parties to the contract that this defendant in error seek for

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and discover omitted real estate upon which taxes were then legally due and unpaid, that *the taxes then legally due and unpaid should be placed upon the tax duplicate*, and then out of these taxes, and no others, he should be paid for his services. But it was not the intention of either party to the contract that, after that time, notwithstanding the property should still continue upon the tax duplicate and still continue to be taxed, defendant in error should receive any part whatever of these future taxes. In other words, the whole contract, by its specific terms, related to the taxes then due and unpaid, and not to future taxes that might thereafter be charged against this property.

These facts all appearing from the petition, it follows that the superior court of Cincinnati erred in overruling the demurrer to the petition and that the circuit court also erred in affirming that judgment.

Judgment reversed and judgment for plaintiff in error.

SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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HUPP ET AL. v. THE HOCK-HOCKING OIL & NATURAL GAS COMPANY.

Such interpretation of a provision of the constitution—Will be given as will promote the objects of its adoption, when—Amendments Sections 2 and 6 to Article IV of Constitution—Adopted September 3, 1912—Do not revoke jurisdiction of supreme court to review cases—Decided by the circuit court prior to January 1, 1913—In which petition in error was filed in supreme court after that date—Constitutional law—Court procedure.

1. Such interpretation will be given to a provision of the constitution as will promote the object of the people in adopting it, when such object is clearly indicated in the context, and to this end narrow and technical definitions of particular words will be disregarded.
2. Rights to invoke the jurisdiction of courts of review, which are secured to litigants by valid laws in force during the progress of a litigation, will not be held to have been afterwards revoked by amendment, unless by express language or by provisions from which it must follow by necessary implication that such result was intended.
3. The amendments—Sections 2 and 6 to Article IV of the Constitution—adopted September 3, 1912, and which, by the schedule adopted at the same election, went into effect January 1, 1913, do not revoke the jurisdiction of the supreme court to review cases decided by the circuit courts prior to January 1, 1913, in which the petition in error was filed in the supreme court after that date in accordance with the laws in existence at the time of the decision by the circuit court.

(Decided May 6, 1913.)

ERROR to the Circuit Court of Hocking county.

The original action was commenced in the common pleas of Hocking county, and passed to judgment in that court in April, 1912. The case was appealed to the circuit court, where judgment was rendered December 30, 1912. Plaintiffs in

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error filed their petition in this court February 17, 1913, to reverse the judgment of the circuit court. Defendant in error has filed its motion to strike from the files, and dismiss the petition in error, "for the reason that the supreme court has no jurisdiction to review the judgment of the circuit court of Hocking county entered therein on December 30, 1912, this proceeding in error not having been commenced prior to January 1, 1913."

A number of similar motions in other cases have been filed in which the same question raised in the motion in this case is presented. All of these motions are considered together. The various counsel in the different cases have submitted briefs touching the question involved, all of which have been considered.

Mr. W. E. Sykes; Mr. H. M. Whitcroft; Mr. C. V. Wright; Mr. A. D. Metz; Mr. J. W. Campbell; Mr. Joseph P. Owens; Mr. J. J. Weadock; Messrs. Welty & Downing; Mr. Thomas E. Powell; Mr. Edward T. Powell; Mr. E. L. Mills; Mr. Carl Norpell; Mr. David Fording; Messrs. Armstrong, Light & Shappell and Messrs. M. B. & H. H. Johnson, for plaintiffs in error.

Mr. M. A. Daugherty; Mr. B. F. McDonald; Mr. Walter C. Ong; Mr. Charles E. Ballard; Mr. George W. Mannix, Jr.; Mr. D. W. Bowman; Mr. W. N. King; Mr. E. D. Davis; Mr. Joseph Gallagher; Mr. Joseph O. Fritz; Messrs. Grosvenor, Jones & Worstell; Messrs. Sheets & West; Messrs. Owen & Ware and Messrs. Waite & Deaton, for defendants in error.

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JOHNSON, J. The ground of the motion is that the amendments, Sections 2 and 6 to Article IV of the Constitution, adopted by the people at the election held in September, 1912, and which, by the schedule adopted at the same election, went into effect January 1, 1913, deprive this court of jurisdiction to review cases decided by the circuit court prior to January 1, 1913, in which the petition in error was filed in this court after that date.

Prior to the adoption of the amendments referred to, Section 2 of Article IV of the Constitution contained the provision: "It [the supreme court], shall have original jurisdiction in *quo warranto*, *mandamus*, *habeas corpus* and *procedendo*, and such appellate jurisdiction as may be provided by law."

Under the authority therein conferred, Section 12250, General Code, was enacted: "A judgment rendered or a final order made by a circuit court or a judge thereof, court of common pleas or a judge thereof, probate court, insolvency court or a superior court or a judge thereof, may be reversed, vacated or modified by the supreme court, on a petition in error, for errors appearing on the record."

Pertinent parts of the amended Sections 2 and 6 are as follows:

"Section 2. * * * All cases pending in the supreme court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law."

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"Section 6. * * * The courts of appeals shall continue the work of the respective circuit courts and all *pending cases and proceedings* in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law, and cases brought into said courts of appeals after the taking effect hereof shall be subject to the provisions hereof, and the circuit courts shall be merged into, and their work continued by, the courts of appeals."

The schedule provides: "The several amendments passed and submitted by this convention when adopted at the election shall take effect on the first day of January, 1913, except as otherwise specifically provided by the schedule attached to any of said amendments. All laws then in force, not inconsistent therewith, shall continue in force until amended or repealed; provided that all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law. Any provision of the amendments passed and submitted by this convention and adopted by the electors, inconsistent with, or in conflict with, any provision of the present constitution, shall be held to prevail."

It is insisted that inasmuch as the judgment of the circuit court was rendered prior to January 1, 1913, and the petition in error was not filed in this court before that date, it was not then a "pending case," and, therefore, not within the saving provision of Section 6, that "All pending cases and proceedings in the circuit court shall proceed to

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judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law."

Was it the intention of the people, when they adopted the amendments above referred to, to withdraw from the supreme court jurisdiction to review judgments, such as described, and which it exercised under original Section 2 and Section 12250, General Code, above quoted?

The duty of the court, and its only proper purpose, in the construction of these amendments, is to ascertain and give effect to the intent of the people when they wrote them into their constitution.

In the endeavor to promote the objects for which they were framed and adopted, rules which are merely technical should not be permitted to thwart the attainment of those objects, by forcing from them a meaning which their framers never held. No narrow reasoning should be allowed to lead to the disregard of these principles, which have become fixed and fundamental.

If the contention of those supporting the motion be correct, then the convention which submitted the amendments and the people adopting them left a hiatus in the system for the administration of justice; that is to say, they left a period in which parties to cases pending in the circuit courts and decided prior to January 1, 1913, should not have the benefit of existing laws as to review of such causes, unless the proceeding was brought before that date, while cases pending in the same circuit court at the same time, but *not* decided by the court of appeals until after that date, *could* be

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reviewed by this court in the manner provided by law.

By adopting this construction, we would hold that the circuit court had final jurisdiction in the cases which it had decided, as above described, although there is not contained in the constitution or laws in effect prior to the adoption of the amendments, and there is not contained in the amendments themselves, any provision that the circuit court should have final jurisdiction, in the sense that its judgments should not be subject to review.

No reason is apparent in the terms of the amendments, and none is suggested, why such discrimination was intended to result from the merging of the circuit courts into the courts of appeals. There is not disclosed, in any language used, any intention on the part of the people to withdraw the right of parties to have the judgments of the circuit courts reviewed in the manner provided by the constitution and the laws in existence at the time the amendments were adopted. On the contrary, there is a very apparent purpose shown in the amendments and in the schedule, to preserve to litigants, who had already invoked the jurisdiction of the circuit courts, the right to have their causes proceed as before. The evident determination was to merge the old courts into the new, fully and completely, in such manner as to secure all rights which parties had been entitled to under the earlier tribunal. Is the phrase, "pending cases and proceedings in the circuit courts," of such clear, definite and limited meaning as to exclude cases falling within the class

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above referred to? We do not think that such a narrow and technical construction of that phrase, as it is used in this amendment, is warranted.

In this connection, we remark that in the same amendment—Section 6—it is provided that, with certain specific exceptions, “the judgments of the courts of appeals shall be final.” Heretofore, under our procedure, it was necessary that a judgment should be final before it was subject to review, but it is manifest that, in the amendment referred to, the word “final” is used in a sense which means that the judgments are not subject to review. The phrase “pending cases and proceedings” seems not to have a definite meaning—fixed by authority—although the provisions of Section 26, General Code, with reference to the effect of the repeal or amendment of a statute, on pending actions, have been construed by this court in a number of cases. The meaning of such a phrase must be gathered from its context, and the assistance to be had from any decided case must necessarily depend on the similarity of the context to that of the phrase involved in the inquiry.

In *Bode, Adm.x., v. Welch*, 29 Ohio St., 19, a judgment was recovered against Welch before a justice of the peace on March 26, 1875. Defendant was entitled by the law then in force to an appeal, on giving a bond within ten days. This he did, giving his appeal bond on April 5, 1875. On March 30, 1875, the section of the law giving this right of appeal was repealed without any saving clause as to actions pending or causes of actions subsisting. But it was provided by the

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act of February 19, 1866 (63 O. L., 22), that "whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions * * * unless otherwise expressly provided in the amending or repealing act." The court held that the act of March 30, 1875, must be construed as though the above-quoted section of the act of 1866 were appended to it, and that the case, after judgment in the justice court, was a pending action or proceeding or cause thereof, so that the amendatory act of 1875 did not affect the right of appeal therefrom. The court say: "It is true, in a strictly technical sense, that there was no 'action' or 'proceeding' pending at the time the repealing act took effect, because a 'final judgment' had been rendered therein. But the judgment was final only with reference to the power of the court, and its action in the case. With reference to the rights of the parties it was not final. That which can be vacated and superseded is not final, as between the parties having the power to set it aside."

In *Wegman v. Childs*, 41 N. Y., 159, the question presented was whether the supreme court, under the constitution of 1846, had jurisdiction to award an execution upon a judgment entered in the court of common pleas before the adoption of the constitution, where such judgment was rendered in a suit originally commenced in that court. It was provided by the 5th section of article XIV of the constitution that jurisdiction of all suits and proceedings pending in the supreme court and court of chancery, and all suits and proceedings originally commenced and pending in the

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court of common pleas, except in the city and county of New York, on the first Monday of July, 1847, should become vested in the supreme court thereby established. It was held that an action is pending in a court, though judgment has been rendered, as long as the judgment is unsatisfied. The court say: "It was also decided in this court, in the case of *Suydam v. Holden*, that the supreme court has power under the constitution of 1846, which gives to that court jurisdiction over all suits pending in the court of chancery on the first day of July, 1846, to vacate the entry of satisfaction of a final decree of that court, entered on its records prior to 1846, on the return of the execution unsatisfied, and to order a new execution to be issued on the decree."

In the case of *United States v. Taylor*, 44 Fed. Rep., 2, it is held in the syllabus that "Where a territorial court, by its final decree in a case, granted an injunction for the protection of a continuing right, the case is *after such decree still a 'pending' case*, within the meaning of the 23d section of the act providing for the creation of state governments for Washington and other territories, and is transferable to the court which by said act is made the successor of said territorial court."

As to the contention that because a final decree had been previously rendered, the case had terminated and was not a pending case, the court say: "The decision upon this point involves simply a definition of the word 'pending,' as used in the 23d section of what is commonly called 'the Enabling Act.' * * *

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"When all its provisions are considered, the act manifestly shows that congress intended to fully protect and preserve not merely the rights of parties in a few select and especially favored ones of the cases commenced in the territorial courts, but every right of every party in every case which at any time had been or should be commenced in those courts during their existence; and the words, 'all cases, proceedings and matters pending,' used in the act, must be construed to embrace all cases, proceedings and matters initiated in the territorial courts, and in which at the time of the actual transformation of the territorial judicial system into the state and national system there should be yet any vitality, force or virtue."

This view of the meaning of the word "pending," in different connections in which it has been used, has been upheld in *O'Maley v. Reese*, 1 Barb., 643; *Howell v. Bowers*, 2 Cr. M. & R., 621; *Ex parte Howland*, 3 Okl. Crim. Rep., 142; *Ulshafer v. Stewart*, 71 Pa. St., 170; *Mitchell & Rammelsburg Furniture Co. v. Sampson*, 40 Fed. Rep., 805; *Sherrer v. Caneza*, 33 La. An., 314.

Courts for the review of legal proceedings are, and have been, an essential part of our judicial system. Valuable rights acquired under a system in full and legal operation should not be held by the court to have been withdrawn and destroyed, unless by express language or by provisions from which it must follow, by necessary implication, that such result was intended. This doctrine was upheld in *Commonwealth v. Balph*, 111 Pa. St.,

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379; Endlich on Interpretation of Statutes, Sec. 522.

A careful consideration of the purposes of the amendments in question and of the results which would follow the adoption of the construction contended for by those favoring these motions, leads us to conclude that all rights which parties had in cases pending in the circuit courts prior to January 1, 1913, are preserved in their full integrity, whether judgment was entered in such cases by the old circuit courts or by the courts of appeals into which they were merged.

The motions will be overruled.

SHAUCK, C. J., DONAHUE, WANAMAKER,
NEWMAN and WILKIN, JJ., Concur.

THE STATE, EX REL. CITY OF TOLEDO,
v. LYNCH, AUDITOR.

Provisions of the 18th article of the constitution—As amended September, 1912—Continue in force the general laws—For government of cities and villages until changed—By (1) general laws, (2) additional laws ratified by electors, (3) adoption of municipal charter—Municipality may not establish moving-picture theaters, when.

1. The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article.

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2. Whether a municipality acquires authority "to exercise all the powers of local self-government" by adopting a charter, or adopts a charter as an indispensable mode of exercising the authority, the powers to be exercised, being governmental, do not authorize taxation to establish and maintain moving-picture theaters.

(No. 14064—Decided May 6, 1913.)

In MANDAMUS.

The petition alleges the organization and existence of the relator, the city of Toledo, as a municipal corporation under the laws of the state; that the defendant is its duly qualified and acting auditor; that after November 15, 1912, its council passed an ordinance of which the following is a copy:

"AN ORDINANCE,

"Transferring the sum of one thousand dollars from the General Fund, to the Department of Public Service Fund, and transferring the same for the purpose of establishing a municipal moving-picture theater, and directing the City Auditor to furnish to the Director of Public Service a certificate of such transfer and appropriation as provided by Section 3806 of the General Code of the State of Ohio.

"BE IT ORDAINED BY THE COUNCIL OF THE CITY OF TOLEDO, STATE OF OHIO:

"Sec. 1. That the sum of one thousand dollars be and is hereby transferred from the General Fund to the Department of Public Service Fund, and such amount is hereby appropriated for the purpose of establishing a municipal moving-pic-

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ture theater, and shall be used for no other purpose, and the Auditor of the city of Toledo is hereby directed to make such transfer on the records of his office and to furnish a certificate of such transfer and appropriation to the Director of Public Service as is provided in Section 3806 of the General Code of the State of Ohio.

"Sec. 2. This ordinance shall become operative from and after the earliest period allowed by law and is hereby declared to be an emergency measure to take effect immediately."

That the ordinance was approved by the mayor, and that, on demand, the defendant as auditor, refused to make the transfer and furnish the certificate required by the ordinance. The prayer of the petition is for a writ of mandamus to compel compliance by the defendant with the ordinance.

The defendant, answering, admits the corporate character of the relator, his own official character, the passage of the ordinance, and his refusal upon demand to comply with its terms. To justify his refusal he alleges that: (1) The statutes of the state do not give to municipalities authority to establish a moving-picture theater, and (2) the amendment to the constitution of the state, adopted in September, 1912, relating to local government for municipalities, is not yet effective for the reason that the city of Toledo has not framed and adopted a charter providing for home rule in accordance with the provisions of said amendment. The pertinent provisions of the constitutional amendments referred to in the answer and relied upon by the relator, were adopted in September, to become effective November 15, 1912. All are in

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the fourteen sections of the eighteenth article. They are, in form or adequate summary, as follows:

"Sec. 1. Municipal corporations are hereby classified into cities and villages. All such corporations having a population of five thousand or over shall be cities; all others shall be villages. The method of transition from one class to the other shall be regulated by law.

"Sec. 2. General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall have been submitted to the electors thereof, and affirmed by a majority of those voting thereon, under regulations to be established by law.

"Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Sections 4, 5 and 6 relate to establishing and acquiring public utilities.

"Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government.

"Sec. 8. The legislative authority of any city or village may by a two-thirds vote of its members, and upon petition of ten per centum of the electors shall forthwith, provide by ordinance for the

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submission to the electors, of the question, 'Shall a commission be chosen to frame a charter?' The ordinance providing for the submission of such question shall require that it be submitted to the electors at the next regular municipal election if one shall occur not less than sixty nor more than one hundred and twenty days after its passage; otherwise it shall provide for the submission of the question at a special election to be called and held within the time aforesaid. The ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute a commission to frame a charter; provided that a majority of the electors voting on such question shall have voted in the affirmative. Any charter so framed shall be submitted to the electors of the municipality at an election to be held at a time fixed by the charter commission and within one year from the date of its election, provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law. Not less than thirty days prior to such election the clerk of the municipality shall mail a copy of the proposed charter to each elector whose name appears upon the poll or registration books of the last regular or general election held therein. If such proposed charter is approved by a majority of the electors voting thereon it shall become the charter of such municipality at the time fixed therein."

Section 9 relates to the amendment of charters. Sections 10, 11 and 12 relate to acquiring property

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for public uses by municipalities and providing money therefor.

"Sec. 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities.

"Sec. 14. All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law. The percentage of electors required to sign any petition provided for herein shall be based upon the total vote cast at the last preceding general municipal election."

Mr. Cornell Schreiber, city solicitor, and *Mr. Alonzo G. Duer*, assistant city solicitor, for relator.

We contend that Section 3 granting to cities all powers of local self-government became effective November 15, 1912, and that no further action on the part of the legislature or on the part of the city is necessary to secure to cities all of the powers granted in Section 3.

It is a rule of statutory or constitutional construction that an act or a constitution, or the rights conferred by either, become effective at once, unless an intention to postpone the time that the same shall take effect is conclusively apparent. 1 Lewis' Sutherland Stat. Constr. (2 ed.), 308.

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We contend that the time that Section 3 takes effect is not in any wise limited or postponed by any other section of Article XVIII. Section 3 grants general power to the municipalities, beginning "Municipalities shall have authority," etc.

Section 7 does not provide that the city must adopt a charter. It simply provides that the city may frame and adopt a charter, leaving it optional with the city whether or not it wishes so to do. To say that Section 7 limits or postpones the powers granted by Section 3 would be to construe Section 7 as a proviso or limitation. That Section 7 is not intended as a proviso or limitation upon Section 3 is quite clearly apparent from its position in the amendment. Between Sections 3 and 7 are Sections 4, 5 and 6, pertaining to public utilities. The natural and logical position of a proviso is immediately after the matter which it is intended to limit. 2 Lewis' Sutherland Stat. Constr. (2 ed.), Secs. 352, 420.

The very language of Section 3 makes this section self-executing. It provides that municipalities shall have authority to exercise all powers, etc. The word "shall" here has a significant and conclusive meaning, which is strengthened by the argument that this is an entirely new section of the constitution, granting certain rights which the city did not heretofore have and which the legislature could have granted without the adoption of this amendment, and which the constitution evidently intends to secure to the municipalities without hindrance from any one. The word "shall" must be construed in this light when it is considered in connection with the object manifestly

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intended to be accomplished. *Willis v. Mahon*, 48 Minn., 140.

In the constitution of Ohio and in the amendments adopted on September 3, 1912, there are very many provisions that undoubtedly are self-executing, and as well stated in the above case such provisions are becoming more and more common for the purpose of granting absolute rights which the legislature cannot destroy.

In this very case, *State, ex rel., v. Lynch*, 87 Ohio St., 444, this court has declared one provision of the constitution to be self-executing, in the first and second sections of the syllabus. *Hannibal & St. Jo. Rd. Co. v. State Board of Equalization*, 64 Mo., 294.

That Section 3 is self-executing and imperative is further apparent from the fact that Article XVIII of the constitution clearly uses the words both "may" and "shall" advisedly and in their usual sense.

It seems to us to be perfectly clear that when the words "may" and "shall" appear so frequently in the same article and in such close proximity, that the same are used advisedly and in their natural sense, the word "shall" conveying the impression of command and the word "may" of permission. 2 Lewis' Sutherland Stat. Constr. (2 ed.), 1154.

That the provisions of Section 3 may be carried out under existing laws is quite in line with the decision of the New York court of appeals in *People, ex rel., v. Roberts*, 148 N. Y., 360, 31 L. R. A., 399.

Argument for Respondent.

We contend that a municipal moving-picture theater is properly a municipal enterprise. 1 Dillon on Municipal Corporations (5 ed.), Sec. 21.

It will be apparent from all the foregoing that our contention is that Section 3 enlarges the powers of the cities so that they now have all powers of local self-government. By this we do not mean to say that the cities are not subject to any laws of the state. Not at all. We simply mean to say that they operate under the general laws, but with enlarged powers. So that the amendment to the constitution supersedes those sections of the statutes conferring specific powers upon municipalities, but still leaving cities subject to the general laws as to the details with which such powers may be carried out.

Mr. Frederick J. Flagg, for respondent.

The contention of the respondent is that Section 3 is a declaration of a principle; that it is addressed to, and is a limitation on, the legislature; and that Section 2 and Sections 7, 8 and 9, prescribe the methods by which the local self-government shall be carried into effect; that Section 3 does not contain within itself the method or the means by which the right should be exercised, nor does it define what local self-government is and what its limits are, and that Section 3 is not self-executing. Cooley on Const. Lim. (7 ed.), 121; *Illinois Central Ry. Co. v. Ihlenberg*, 75 Fed. Rep., 877; *Morley v. Thayer*, 3 Fed. Rep., 740.

Construing the whole of Article XVIII together, it is apparent that Sections 2 and 7 point out the way the authority shall be given to municipalities.

Argument for Respondent.

It is clearly the intention of the constitution that general laws "shall be passed" for the incorporation and government of cities under the idea that those cities shall exercise the powers of self-government, and it is also clear that there are now no general laws in force for the incorporation and government of cities, having in view the declarations of Section 3, that cities shall have authority to exercise all powers of local self-government. Section 6, Article XIII of the Constitution of 1851, said: "The general assembly shall provide for the organization of cities * * * by general laws and restrict their power of taxation," etc. The word "government" in Section 2 of Article XVIII is very important and was put there for a purpose.

We contend that these sections supply the method which is lacking in Section 3 and that they should be construed with Section 3 to effectuate the spirit of the article, which is home rule for cities, the powers of government coming from the electors. Section 7 is made subject to Section 3, which shows they should be construed together.

It is very clear from the whole article that the powers of local self-government shall be exercised by cities under general laws to be passed by the general assembly. This appears from Section 2, Section 3 and Section 7. The article does not mean that municipalities shall be absolutely independent in their local self-government.

We submit that the words "shall have authority" mean that the general assembly shall in the future give the cities their powers, or they can secure them by the adoption of a charter. Under

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the prior constitutions, the general assembly has always given to cities their powers, and it is a fair argument to say that the constitutional convention had this in mind when they drafted this section. The interpretation of one constitution may be aided by the provisions of the constitution preceding. *City of Newport News v. Woodward*, 104 Va., 58.

It is significant that although California has had a section similar to Section 3 for many years, and Washington for several years, counsel for relator do not cite any case which holds that the cities of California had the authority to make and enforce within its limits all "such local police, sanitary and other similar regulations," without first having framed a charter. That they have not, is proof that there is none.

After the Washington constitution was passed, the legislature passed an act providing for the organization, classification, incorporation and government of cities. *Seattle v. Clark*, 28 Wash., 723; 8 Cyc., 739; *Langdon v. Applegate*, 5 Ind., 327.

Parts of the Ohio constitution have been held not to be self-executing. *Lamb v. Lane*, 4 Ohio St., 167.

In Illinois, Missouri, West Virginia and Alabama, the constitutional provisions against taking private property for public use without just compensation therefor, are held to be self-executing, even though the method of ascertaining such compensation is left in the legislature's determination. 6 Am. & Eng. Ency. Law (2 ed.), 913; 8 Cyc., 754.

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Thus Ohio, in the matter of construing this provision of the constitution, does not go as far as the states mentioned. *W. T. Spice & Son v. Steinruck*, 14 Ohio St., 213.

In other states the authorities do not agree as to whether constitutional provisions authorizing cities of a limited number of inhabitants to frame charters for themselves are self-executing. 8 Cyc., 757; *People v. Hoge*, 55 Cal., 612; *Reeves v. Anderson*, 13 Wash., 17; *Fusz v. Spaunhorst*, 67 Mo., 256; *Tuttle v. Natl. Bank of Republic*, 161 Ill., 501.

If a constitutional provision succeeds another on the same subject, and the former plainly required legislative action to become effective, while the latter is ambiguous on that subject, the courts will hold that the latter requires legislative action also. *Newport News v. Woodward*, 104 Va., 58; 8 Cyc., 753.

If Section 3 gives full powers of local self-government to all cities, then Sections 7, 8 and 9 are entirely unnecessary, and cities under Section 3 would have full power to make any kind of a charter by any method they pleased.

If Section 3 gives of itself full powers of self-government to municipalities, they may by ordinance establish a municipal moving-picture theater, and by ordinances do all the things they wish to, such as pass rules for their government. Then these ordinances would be their charter, and it would be by a different method from that laid down in Section 7, and absolutely opposed to it, and to the spirit of it, as it would be the legislative authority which would be framing the charter

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and not the electors. It would give the legislative authority in cities *eo instanti* all the authority possible which the people under Section 7 might or might not give them.

Mr. Timothy S. Hogan, attorney general, and *Mr. J. M. McGillivray*, special counsel, *amici curiae*.

The powers of municipalities are such as are expressly conferred by law, and such implied power as may be necessary to carry the express powers into effect. *Ravenna v. Pennsylvania Co.*, 45 Ohio St., 118.

Their powers are strictly limited. *Bloom v. Xenia*, 32 Ohio St., 465.

Inasmuch as the grant of power, in Section 3 of Article XVIII, is worded, "Municipalities shall have authority to exercise all powers of local self-government," and the contention of relator is that the power to pass the ordinance in question is found in this grant, does not the conceded fact that there are no laws now in force authorizing the doing of that which is attempted end the controversy, because, all laws then in force (meaning, of course, as to the matter under consideration November 15, 1912), shall remain in force until amended or repealed, unless they be inconsistent with the amendment?

The result, therefore, is, laws in force on November 15, 1912, are still in force. They do not authorize the Toledo ordinance, yet it is claimed to be supported and given validity by Section 3 of Article XVIII on account of the fact that it is claimed to be self-executing.

Argument for Respondent.

As a term descriptive of a policy, home rule is significant and appropriate, but as descriptive of a right is indefinite, for it is coextensive with the right of local regulation and control and its extent must always be tested by the constitution. 21 Cyc., 447; *Attorney General v. Lowrey*, 131 Mich., 642.

What is local self-government? The answer to this question is to be found, in so far as we have any answer, in conditions that prevailed prior to the adoption of the home-rule amendment and in the light that existed prior to that time. *Cooley on Const. Lim.* (7 ed.), 265.

Local powers and rights are powers and rights that are inherent in a municipality. The legislature does not confer such local powers and rights—it has only the right of regulation, and there should be reasons of state policy before this right is to be interposed. So that, in theory, the home-rule amendment has conferred very little upon municipalities which they did not heretofore enjoy. What has heretofore been understood as matters proper to be regarded as coming under the head of local government are still so, and nothing beyond that. It may be said at this point that the legislature has power to make laws only because that power has been conferred by the constitution. *Cooley Const. Lim.* (7 ed.), 264.

Will it be said for a moment that although the legislature must look to the people speaking through the constitution for legislative power, and although they are subject to all of the limitations contained in the constitution of Ohio, yet a municipal corporation by virtue of Section 3 of

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Article XVIII, and Section 3 of Article XVIII only, is an omnipotent local legislature? Such an interpretation as this would confer upon the council of a municipal corporation a prerogative equalled only by the British parliament. Surely we have not in Ohio approached such vagaries as that. If unbridled license is given to the council of a municipal corporation under Section 3 of Article XVIII, what need of the grant of power contained in Sections 4, 5 and 6 following Section 3? The fact of the necessity of adding the subject-matters contained in Sections 4, 5 and 6 discloses that the powers therein to be exercised have not heretofore been regarded as coming properly under the head of local self-government. Cooley Const. Lim. (7 ed.), 265.

How can it well be claimed that the legislature could heretofore invest municipalities with the right to go into the picture-show business? Is that a governmental business? *Opinion of Justices*, 155 Mass., 601; *Baker v. Grand Rapids*, 142 Mich., 687.

Mr. Henry J. Booth; Mr. Thomas H. Hogsett; Mr. Thomas J. Keating and Mr. Frank M. Cobb,
for respondent.

One of the cardinal rules of interpretation requires that all provisions *in pari materia* must be construed with reference to each other, so that, if possible, effect may be given to every word, clause and sentence in the article or statute under consideration; another is that grants of power to municipal corporations are strictly construed against the corporation and in favor of the public.

Argument for Respondent.

Markley v. Mineral City, 58 Ohio St., 430; 1 Smith on Municipal Corporations, Sec. 82; Abbott on Municipal Corporations, Secs. 113, 890.

The power to establish, maintain and operate theaters and other similar enterprises may, and in most instances would, involve the exercise of the power of taxation, the incurring of indebtedness and the expenditure of public moneys; and the rule which prevails with reference to the construction of statutes would by parity of reason apply to the construction of constitutional provisions. 2 Lewis' Sutherland Stat. Constr. (2 ed.), 632; Sedgwick on Stat. and Const. Constr., 19; Cooley's Const. Lim. (7 ed.), 271; Dillon on Municipal Corporations (5 ed.), Sec. 239; *Leonard v. Canton*, 35 Miss., 189; *Opinion of Justices*, 155 Mass., 598; *Sutherland-Innes Co. v. Village of Ewart*, 86 Fed. Rep., 597, 30 C. C. A., 305; *Lowell v. Boston*, 111 Mass., 454; *Loan Assn. v. Topeka*, 20 Wall., 655; *Ottawa v. Carey*, 108 U. S., 110; *Cole v. La Grange*, 113 U. S., 1; *State v. Osawkee Tp.*, 14 Kans., 418; *Allen v. Inhabitants of Jay*, 60 Me., 124; *Mather v. Ottawa*, 114 Ill., 659.

Section 3 of Article XVIII of the constitution authorizes municipalities to exercise all powers of local self-government, etc.

Is the establishment of a moving-picture theater the exercise of such power? If not, the relator is not entitled to the relief sought in this case.

Municipal corporations perform two kinds of functions—governmental and proprietary—and this court has frequently recognized the well-defined distinction between these functions.

Argument for Respondent.

The power which the city of Toledo is seeking to exercise by establishing a moving-picture theater is not governmental. *Cincinnati v. Cameron*, 33 Ohio St., 336.

The principle of *respondeat superior* applies to municipal corporations where the acts of their servants or agents refer to powers and duties ministerial in their nature and character. *Toledo v. Cone*, 41 Ohio St., 149; *Davoust v. City of Alameda*, 149 Cal., 69, 5 L. R. A., N. S., 536; *South Carolina v. United States*, 199 U. S., 437; *Western Savings Fund Society v. Philadelphia*, 31 Pa. St., 175.

It is certainly unnecessary to cite authorities to this court in support of the proposition that no such action would lie in case of injury resulting from negligence where the municipality is exercising purely governmental functions. *Wheeler v. Cincinnati*, 19 Ohio St., 19.

The constitution provides that private property shall not be taken for public use without just compensation. If the establishment, maintenance and operation of a theater, as held in *Brooks v. Brooklyn*, 146 Ia., 136, and on principle in numerous other cases, is not within the corporate powers of a municipality, we insist that the taxation necessary to procure funds for such an enterprise is the taking of private property without just compensation. *Opinion of Justices*, 58 Me., 590; *Opinion of Justices*, 204 Mass., 607; *Kingman v. Brockton*, 153 Mass., 255; *Baker v. Grand Rapids*, 142 Mich., 687; *Hayward v. Red Cliff*, 20 Cal., 33; *Eufaula v. McNab*, 67 Ala., 588; *Donable's Admr. v. Harrisonburg*, 104 Va., 533; *Keen v. Waycross*,

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101 Ga., 588; *City of Radford v. Clark*, 73 S. E. Rep., 571; 1 Cooley on Taxation (3 ed.), 210; *Audit Co. of N. Y. v. City of Louisville*, 185 Fed. Rep., 349.

We claim, first, that Section 3 of Article XVIII is merely the declaration of a general principle and does not provide any procedure or rule by which the same may be carried into effect; second, that if the powers of local self-government specified in Section 3 may be exercised by municipalities the mode of such exercise is specified in Sections 7, 8 and 9. Cooley's Const. Lim. (7 ed.), 121; 8 Cyc., 753; *Davis v. Burke*, 179 U. S., 399.

Municipalities may exercise the power of local self-government only as provided in Sections 7, 8 and 9 of Article XVIII. *State v. Covington*, 29 Ohio St., 102.

The question of the construction of these provisions and the power conferred is considered at length in Dillon on Municipal Corporations (5 ed.), Sec. 63. In all of the states where freeholders' charters are authorized by the constitution, there are provisions similar to those contained in Section 3, Article XVIII of the Constitution of Ohio, that is, provisions authorizing the municipality to exercise all powers of local self-government. In all of them it has been held that the adoption of a freeholders' charter is the means by which the electors of a municipality may exercise the powers of local self-government. In none of these states is it suggested that the council of a municipal corporation may frame such a charter. In fact, the right to frame a charter otherwise than by a charter commission has never been attempted, at

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least so far as the reported decisions disclose. All of the cases assume, and in some cases it is expressly stated, that the right to frame a charter must be exercised under and in accordance with the procedure set forth in the constitution. *People v. Gunn*, 85 Cal., 238; *Ex parte Braun*, 141 Cal., 204; *Reeves v. Anderson*, 13 Wash., 17; *State v. Field*, 99 Mo., 352; *Kansas City v. Marsh Oil Co.*, 140 Mo., 458; *State, ex rel., v. Scales*, 21 Okla., 683.

In Ohio only a few provisions of the constitution have been passed upon by this court in respect to the question of whether or not they are self-executing. These decisions will be supplemented by authorities from other jurisdictions which may be of assistance in passing upon the question involved. *Lamb et al. v. Lane*, 4 Ohio St., 167; *Kulp v. Fleming*, 65 Ohio St., 321; *Middletown Natl. Bank v. Toledo, A. A. & N. Ry. Co.*, 197 U. S., 394; *Older v. Superior Court*, 157 Cal., 770; *Woodworth v. Bowles*, 61 Kans., 569; *Tuttle v. Natl. Bank*, 161 Ill., 497; *Lewis v. Lackawanna County*, 200 Pa. St., 591; *Commonwealth, ex rel., v. Harding*, 87 Pa. St., 343; *Morley v. Thayer*, 3 Fed. Rep., 737; *Roback v. Taylor*, 2 Bond, 36; *Austin v. Gulf, C. & S. F. Ry. Co.*, 45 Tex., 234; *Brown & Co. v. Seay*, 86 Ala., 122; *State, ex rel., v. Spokane*, 24 Wash., 53; *Newport News v. Woodward*, 104 Va., 58; *Chittenden v. Wurster*, 152 N. Y., 345.

Mr. Scott D. Kenfield and *Mr. A. J. Freiberg*, also submitted briefs on behalf of respondent.

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SHAUCK, C. J. We understand it to be conceded that prior to November 15, 1912, when the constitutional amendment set out in the statement of the case became effective, the councils of municipalities were without authority to use public moneys for the purpose of establishing and operating moving-picture shows. Certainly the absence of plain statutory authority therefor denotes its absence. As the city of Toledo had existed and flourished from its founding without a municipally-owned attraction of that character, the declaration of the second section of the ordinance that it is an "emergency measure" must be taken to mean that it is a measure for which there is now supposed to be opportunity.

The case of the relator requires it to maintain the two propositions that without action by the general assembly or the electors of the city its council may "exercise all powers of local self-government," and that the suggested mode of entertainment is within those powers. Both propositions are denied. Brief attention to the history out of which this amendment arose will aid materially in understanding its form and some of its provisions and in answering some of the questions which the present case presents for determination.

The first half-century of our statehood, as was universally conceded, had demonstrated the necessity for uniform legislation upon the subject of corporations, both municipal and private, in order that there might be a system of corporate law. This was a recognition of the very great importance of opportunity to know what the law is. Such uniformity was in terms required by the constitu-

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tion of 1851. Thereafter municipalities rapidly increasing in size and numbers attracted the attention of lobbyists whose schemes were not always acceptable to each other nor to a majority of legislators, and resort was had to a scheme of acts of limited operation, though in a form assumed to be general, whereby the practical operation of the requirement was weakened and finally so far annulled that the municipal law of the state was without form and much of it was void. By the year 1902, the situation was recognized as intolerable and the full operation of the constitutional requirement was restored. Throughout the ensuing decade, that requirement was respected by all departments of the government of the state; municipal credit was greatly improved, and it became apparent that every city in the state had a much better government than any had before. But progress toward the perfection of the uniform municipal code was slow. It was retarded partly, at least, by differences in the suggestions of natural persons who control or desire to control the exercise of municipal power. These were said to be differences in the needs of different municipalities. Many believed that the differences were altogether subjective and in no sense objective. There was, too, a belief entertained by many disinterested persons that the form of government devised was, at least in many of the municipalities, too expensive and that it added unnecessarily to the burden of taxation. It resulted that in framing the amendment now under consideration, influence was exercised both by those who believed that the best results could be obtained by continuing to

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unite the intelligence and activity of the state upon a further improvement of the General Code and by those who believed that more satisfactory results could be reached by conferring upon the electors of different municipalities a larger influence in establishing the instrumentalities for their local government. Full authority for this statement is found in the provisions of the article.

By the first and second sections municipalities are classified as cities and villages, and the legislature is peremptorily required to pass general laws for their organization and government. On the 15th of November, when the article took effect, such laws were already in force, and they continued to be in force, operating upon every municipality in the state until a change should be effected in some mode authorized by the amendment. This conclusion results necessarily from the familiar doctrine of *Cass v. Dillon*, 2 Ohio St., 607, where it was held that the new constitution of the state (that of 1851) created no new state. It only altered in some respects the fundamental law of a state already in existence; and even this was done pursuant to the prior constitution, under whose provisions the convention was called and the new constitution framed. It follows that all laws in force when the latter took effect, and which were not inconsistent with it, would have remained in force without an express provision to that effect: and all inconsistent laws fell simply because they were inconsistent; in other words, all repugnant laws were repealed by implication. The conclusion also results from the express provision of the general schedule to the present amendments: "All

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laws then in force [when the adopted amendments took effect] not inconsistent therewith shall continue in force until amended or repealed." It follows that on the 15th of November the government of every municipality in the state remained unchanged.

But the amended article authorizes the electors of a municipality to secure some immunity from the uniform government which it perpetuates as the primary status of all municipalities, and to entitle their municipality "to exercise all powers of local self-government." We have heard and read much discussion of the cases upon the self-executing capacity of constitutional provisions. The rational rule upon the subject clearly deducible from the decided cases is that such provisions are, or are not, self-executing according to their nature and terms. Much of the discussion in the cases cited relates to constitutions which perform the function heretofore regarded as appropriate of locating the powers of government and defining the modes of their exercise. From that source but little argument can be drawn to affect the interpretation of an instrument so largely legislative as is this. It is also to be observed that questions respecting the self-executing capacity of constitutional provisions usually relate to the necessity for legislative action to make them effective. This article provides two modes of securing the permitted immunity from the operation of the uniform laws which the legislature is required to pass. One of them is defined in the second section, and manifestly it is not self-executing, for it expressly authorizes the legislature to pass "additional laws,"

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that is, laws additional to the general laws which the legislature is required to pass, such additional laws to become operative in a municipality only after their submission to the electors thereof and affirmance by a majority of those voting thereon. The other mode is defined in the provisions of the later sections relating to the adoption of charters. From the terms and nature of these latter provisions they are self-executing in the sense that no legislative act is necessary to make them effective.

A fundamental defect in the relator's case is that it assumes that a power conferred upon a municipality is conferred upon its council, although every provision of the amendment with respect to this body merely authorizes it to make provisions for ascertaining the will of the electors. No additional act of the legislature is contemplated with respect to the adoption of a charter. The clear provisions of that article are first for the submission by the council to the electors of the question: "Shall a commission be chosen to frame a charter?" and, that question being answered in the affirmative by a majority of the electors, that any charter framed shall be submitted to the electors at an election "provision for which shall be made by the legislative authority of the municipality in so far as not prescribed by general law;" the meaning of which plainly is that the municipal council may legislate first with respect to the preparation of a charter and second with respect to a submission to a popular vote of a charter framed, and that an approving vote of a majority of the electors of the municipality is indispensable to the adoption of a charter or the securing of any

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power beyond the general law. It seems, therefore, to be entirely beyond doubt that since the city of Toledo had not by a vote of its electors approved any additional law passed by the general assembly, and that its electors had not adopted a charter, the municipality and all of its departments have only such powers as were conferred by the general law; that is, such power only as it had prior to the 15th of November. In some of the cities of the state the subject of adopting charters is, as we learn from counsel and from the public press, receiving consideration. It should occasion no surprise that we are urged to attempt here a complete exposition of the powers of local self-government which in that mode municipalities may exercise. But as the case we are to determine does not call for such comprehensive exposition, judicial propriety forbids it. Obviously, the adoption of a charter will be regarded as offering opportunities for the use of public money which the uniform law does not permit, and which perhaps it will never permit, but we cannot anticipate all the enterprises which may be suggested, and we should not assume in advance to be able to anticipate all the learning which may be bestowed upon an analysis of the instrument. It is, however, pertinent to observe that at a time when there is serious need to use the public credit for the repair of extensive injuries to public property wrought by disastrous floods, something has occurred to impair that credit to a very serious extent. Obviously, there are far-reaching laws which cannot be annulled by statutes or constitutional amendments.

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But the case before us presents the question whether the establishment and operation of a moving-picture show is within "the powers of local self-government," and the question has received the attention of able counsel. In the amendment the phrase is used without definition and with the manifest intent that its operation shall be according to its established meaning. It is fundamental in interpretation that statutes in derogation of the common law and amendments to statutes and constitutions shall have such and only such operation as is due to the natural import of their terms. The effective search for truth as well as the decorum due the convention and the people by whom the amendment was framed and adopted requires us to impute to them a knowledge of that fundamental and familiar rule, and also to assume that they expected the courts to apply it to their work. Since municipalities get their powers from the state, it is mathematically certain that they can include no power not possessed by the state. Local self-government is necessarily a part of government less than the whole.

In *The State, ex rel., v. Guilbert*, 56 Ohio St., 575, we recognized the truth familiar to all constitutional lawyers, that the functions of the state are governmental only, except so far as proprietary rights may become incident to the exercise of the primary function, and that since the insuring of titles does not essentially differ from any other insurance or business, the state cannot enter upon the business of insurance. How little would remain of the assurance which the Bill of Rights gives to minorities as well as to majorities that:

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"All men * * * have certain inalienable rights, among which are those of * * * acquiring, possessing and protecting property," and that private property may be taken only for uses which are public, if the proceeds of industry and thrift may be seized for the establishment and operation of moving-picture shows and all other imaginable purposes not more frivolous nor more remote from the functions of government.

Consciousness of inadequate prevision forbids an attempt at a conceptual definition of the phrase "all powers of local self-government" to be applied to all cases that might arise. But an obviously correct descriptive definition is sufficient for the case in hand. They are such powers of government as, in view of their nature and the field of their operation, are local and municipal in character. The force of the terms employed requires the inclusion of such powers to be exercised by officials who in some manner and to some extent represent the sovereignty of the people. It as clearly excludes the exercise of functions which are appropriately exercised by caterers and impresarios. The suggestion that moving-picture exhibitions "might be made educational is gratuitous because" that is not their natural object. It is unavailing because article VI. of the Constitution shows that education supported by taxation is to be conducted by "a system of common schools throughout the state."

Among those who had attentively studied the functions of written constitutions it was accepted as a sound proposition that a municipality might own and operate only such utilities as it used in its municipal operations. Those who are respon-

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sible for this amendment were aware that no enlargement of that capacity was denoted by the provisions of the third section that "municipalities shall have authority to exercise all powers of local self-government," and, therefore, they employed the express language of the later section of the article to confer that capacity with respect to other utilities. And as to them there are provisions to safeguard the interests of the people, while capacity to operate amusements, if conferred at all, is conferred without restriction. If the language of this instrument were so doubtful as to require construction, a most natural question would occur, and the answer to it would be inevitable: Could we rationally impute an intention to authorize such use of the public money to those who were seeking to reduce the cost of municipal government and the consequent burdens of taxation?

The conclusion that this would be an unauthorized use of public money seems clearly to result from these considerations. If additional authority is desired to support a conclusion so obvious, it may be found in the reporter's abstract of the briefs.

Writ refused.

NEWMAN and WILKIN, JJ., concur.

JOHNSON, J., concurs in the first proposition of the syllabus and in the judgment.

WILKIN, J., concurring. The city council by ordinance directed the auditor to appropriate \$1,000 from the general fund of the city "for the purpose of establishing a municipal moving picture theater."

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The relator concedes that nowhere do the statutes of the state confer any authority upon municipal councils to maintain or establish moving-picture theaters. The power to do that thing is predicated upon Section 3 of Article XVIII of amendments to the constitution of the state, adopted September 3, 1912, viz.: "Municipalities shall have authority to exercise all the powers of local self-government."

The council is not the municipality; it is but an agent of the municipality. When this agent was appointed, its powers were definitely enumerated in the municipal code. It had not "all the powers of local self-government," and the particular power now claimed by it is not one of those designated in the code.

It is only begging the question to say, the clause quoted from Article XVIII confers the power upon the *municipality*. The question is, Has the municipality, the civil organization of the people of the city of Toledo, assumed *all* the power thus conferred upon it by the people of the state?

It cannot be argued that an agent of the municipality, chosen before the state granted to municipalities all this local-governmental power, may exercise a power not within the scope of the agency when the agency was created. There is no pretense that the principal (the people of the city) has done anything since the council was elected to enlarge the authority of the agent (the council). The action of this council is based solely upon the first clause of Section 3, Article XVIII. And the argument of the relator is that the clause shall be interpreted to read thus: Municipal coun-

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cils shall have authority to exercise all the powers of local self-government.

If this be true, this amendment of the constitution at once exalts the creature (the council) above its creator (the municipality). The city of Toledo has not only not a government by *the people* (which is self-government), but *all* the powers of government are at once thrust into the hands of municipal councilmen.

If this council may do what it seeks to do by this ordinance, it may at once proceed to exercise all the powers conferred by Article XVIII of the constitution upon the people of the city. Any council may by a series of ordinances forge upon the people of any city a system of city government to suit the politicians, whereas the very purpose of the home-rule amendment is to lodge directly with the people of the municipality the authority to govern their local domestic affairs within the territorial limits of the city as they may choose.

The people of the commonwealth as the paramount sovereign have the ultimate power to create and govern municipal corporations within the state. The former constitution delegated that power in part to a representative branch of sovereignty, the state legislature. The latter in turn passed over to the municipal lawmaking bodies a share of that power. The advocates of home rule proclaimed that the machinations of politicians and petty bosses, and the occult trade of the lobby, during the last half century, have beguiled these state and city legislators of the interests of the people and diverted those interests to venal uses.

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The eighteenth amendment to the constitution was adopted by the people of the state to thwart this perversion and abuse of power, by giving to the people of the municipalities the authority of controlling their own local affairs by any system of municipal government which they may choose, but subject to certain constitutional restraints. Municipal home-rule therefore means the very opposite of boss-rule, whether the bosses rule through the municipal council or the state legislature.

The purpose of the home-rule amendment (Article XVIII) is to pass the sovereign power of municipal government (within certain subjective limitations) directly from the people of the state to the people of the city, if the latter choose to exercise it. In other words, it parcels out a definite branch of the paramount sovereignty of the commonwealth to certain territorial subdivisions of the state, whose electors by popular ballot decide to assume and to exercise the local sovereignty thus permitted to them as "municipalities," that is, as the incorporated people of a village or city. When the people have elected thus to become a local sovereign, then it may "exercise all the powers of local self-government," through a council, or a director, or a town-meeting, as it may please.

There is no suggestion in this case that the people of Toledo have relieved its council from the restrictions of "the general laws" (which define the council's limited powers), and that the people have made the council a free lance to range over the whole domain of municipal government at will.

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Grant that this particular ordinance is intended to promote some beneficent end. The people have not adopted it. In the whole record before us there is not a vague hint that the people of Toledo have expressed their wish to have a municipal moving-picture theater, or that the theater is to be endowed and operated for the moral or material well-being of the people. For aught that appears the theater may be operated purely for gain, in competition with private persons or companies in the same business. And for what purpose or whose benefit the profits will be used, the promoters of this new departure in municipal government have not disclosed. The business may be conducted by the council as a monopoly, to destroy the business of private owners of picture shows. If the city council may thus drive out the picture shows, then why not the barbers, the laundries, the bakeshops, groceries, music teachers, coal dealers, drug stores, newspapers, and so on *ad infinitum*? All these concern the public health, morals and well-being more intimately than exhibitions of moving pictures for popular entertainment.

Whether this clause of Section 3, Article XVIII, is self-executing or otherwise, we need not discuss. The question is not in this case, and only confuses the issue. One thing is certain. It is not mandatory. By the structure of its language, it is permissive only: "Municipalities *shall have authority* to exercise all the powers of local self-government." This is not equivalent to saying they *must* or *shall* exercise, etc.

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There is no token in the record that this municipality (the people of Toledo) has chosen to avail itself of this grant of all powers of local self-government. Neither the council, the mayor, the director of public safety, nor other agency of the municipality can determine for the people the form, character and objects of their municipal government.

The constitution speaks of but three methods: I. By the state: "General laws shall be passed for the incorporation and government of cities and villages." (Section 2); II. "Any municipality may frame and adopt a charter for its government" (Section 7) which "shall be submitted to the electors," etc. (Section 8); III. Both of these methods may be combined: "Additional laws may be passed which shall not become operative until submitted to the electors," etc. (Section 2).

The city is still governed by the first method—under general laws of the state. The maintenance of moving-picture theaters is not a function of municipal government authorized by the General Code. Until the electors of the city adopt one of the other methods, no branch of the city government may divert the general funds to the business of managing moving-picture shows for profit.

The question has been mooted and debated in this case, whether the maintenance and management of moving-picture shows is a legitimate function of municipal government. This question would better be raised on a different record than the one before us. But it has been pressed upon us as one fairly arising upon the facts of the case. As defined by this record, the moving-picture

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✓ theater must be understood according to the common acceptation—a business for profit. It may be for loss. Public revenue may not be raised nor expended in that way. This is not a function of constitutional government in Ohio. The kinetoscope may be used at some time, in some way, in the proper management of municipal affairs and for the public weal. But the moving-picture *show-business*, as defined, or rather undefined, in this ordinance, is not a fair instance of such a use. ✓ Upon the record before us, it is, to say the least, *prima facie ultra vires* of the municipal council.

The relator has failed to show us that such a use of public funds in a business of profit or loss, in competition with private enterprise, is a function of government, so far as the people of Ohio have as yet, during one hundred and ten years of statehood, by their courts or in their constitution or the recent amendments thereto, defined their theory and practice of government.

By entitling this amendment "Home Rule," did the revisers of the constitution indicate more than a redistribution of some powers of government, shifting all legislation in local affairs from the general assembly of the state to the electorate of incorporated urban communities? Or did they indicate a change of the essential nature of government from the free American plan of individualism toward the foreign cults of communism and paternalism? To the people of Ohio who adopted it, "Home Rule" signified the former change rather than the latter. We are aware that the regulation of the intensely complex and highly artificial life of great modern cities is a problem

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of practical sense and skill rather than of philosophic theory. Probably the ideal system of municipal management is a composite form of individualism modified as to certain communal interests by paternal favor and oversight. The evolution of modern city government seems to be toward that ideal. We do not seek to retard it.

This court is not dealing with *a priori* theory. Our province is to interpret a formal fact and to deduce its meaning from the document in which it is couched. True, we may view the fact in the historical perspective, but only to find its genesis in the common law of the land; as Coke says: "Out of the old fields springeth the new corn." Our question is: Does the document embody a quiet revolution or a social evolution? The latter, we think. It is not a new constitution, but a modification of the old. Nowhere in the original constitution of Ohio, nor probably in any of the last-century state charters, can we find the power of taxation employed for competitive enterprise in the hazard of profit and loss, or that such an enterprise is within the sphere of constitutional government according to the American idea. If the people of Ohio meant to depart so radically from the ancient landmarks, they should and would have used proper language to convey that meaning.

Sections 4, 5 and 6 of Article XVIII, empower municipalities to acquire and operate certain designated public utilities. No claim is made that the business of moving-picture theaters is included in this additional grant of power; theaters are not "utilities" and are not mentioned in the grant. *Expressio unius exclusio alterius est.*

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What is the proper range of government is not a legal but a political question to be decided by the people. It cannot be solved by speculation, but must ever lie open to the teaching of experience and history. But that the people of Ohio on September 3d last voted to make their state a political laboratory in which every village and city may, at the behest of the council, with funds raised by taxation, experiment in every variety of trade or business, as private persons do, is the proposition urged upon us by the advocates for the relator. We must be allowed at least to doubt the soundness of this construction of Article XVIII of the amendments. The rule of law is that the grant of powers to corporate bodies, purely the creatures of law and the agents of the state, is to be strictly construed, and if the grant does not clearly include the power in question, it must be denied. The natural development and safe progress of society, require that the expounders of its constitution shall be cautious—without, of course, being obstructive.

The great and extraordinary writ of mandamus should never issue, unless the right to it is strong and clear and the motives for seeking it are just and lawful, and above suspicion or reasonable doubt. The writ should be refused.

DONAHUE, J., concurring in the judgment but dissenting from the reasons given therefor in the majority opinion.

The fact that I dissent from the reasons given by the majority of the court for the judgment

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entered in this case and yet concur in that judgment, requires that I should give in this separate opinion my reasons for such concurrence.

It is true that the two propositions covered in the majority opinion are the only important questions in this case and the only ones that were argued by counsel. Yet, notwithstanding I dissent from the conclusion reached by the majority upon these questions, in order to be consistent with the conclusion I have reached in respect thereto, I am compelled to concur in the judgment refusing the writ.

The first question arising upon the pleadings and record in this case is whether municipalities now have authority to exercise all powers of local self-government, without adopting a charter, or without further legislation upon that subject. It would seem that the language employed in Section 3 of Article XVIII of the amendment to the constitution, is so plain that it does not require any construction other than to give to that language its usual and ordinary meaning.

This court, in the case of *Slingluff v. Weaver*, 66 Ohio St., 621, held that in the construction of a statute, "the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the lawmaking body, there is no occasion to resort to other means of interpretation."

That rule of construction applies equally to the construction of the constitution, or any paragraph thereof, or to the construction of any contract, or

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other writing, involving judicial inquiry, and applying that rule to the construction of Section 3 of Article XVIII, it would appear to be the end of controversy.

That part of Section 3 with which we are particularly concerned reads as follows: "Municipalities shall have authority to exercise all powers of local self-government." Certainly there is nothing obscure or uncertain in this language. It is so plain, concise and unambiguous that it affords no ground for controversy and suggests no doubt as to its meaning.

It is now insisted on behalf of the respondent, that there must be read into this plain provision of the constitution words imposing conditions precedent to the exercise of this power; that is to say, it must be construed the same as if it read that "Municipalities shall have authority to exercise all powers of local self-government *whenever the legislature shall pass the general or additional laws provided for in Section 2 of Article XVIII, or whenever the municipality shall adopt a charter in conformity to the provisions of Section 7 of that article.*"

For aught I know to the contrary, that might have been a very wise provision to have written in the constitution. But, wise or unwise, it is not there. If it were a mistake not to so write this amendment, correction must be made in some other way than by a construction that will do violence to the language actually found therein.

It probably must be conceded that this language standing alone is not subject to any such construc-

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tion as contended for by counsel for respondent. If it is to receive such a construction, it must be because other sections found in Article XVIII so modify the language of Section 3 as to require that construction. Therefore it becomes necessary to consider the further provisions of Article XVIII to determine that question.

The remaining part of Section 3 reads as follows: "And to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Evidently this does not affect in any way the time when the previous provisions of this section shall go into operation.

Section 1 applies only to the classification of cities and villages. It does not in any sense affect the provisions found in Section 3. But it is important to note that this section, like Section 3, is a clear and positive declaration of a status that is not dependent upon any condition precedent before going into effect.

Section 2 provides that "General laws shall be passed to provide for the incorporation and government of cities and villages; and additional laws may also be passed for the government of municipalities adopting the same." This section is another grant of power absolutely effective on the day this amendment went into effect, and it is not important whether the legislature avails itself of the authority to pass these laws; it is nevertheless the constitution of the state and in full force and operation.

This section certainly contemplates the existence of general laws in effect at the time this amend-

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ment was adopted, and these general laws in relation to municipalities, that are not in conflict with other provisions of this amendment, are now the general laws of the state in relation to municipal corporations, and will continue as such, in full force until repealed or amended.

It is not necessary to have recourse to the doctrine announced in the case of *Cass v. Dillon*, 2 Ohio St., 607, as to the effect of the adoption of the constitutional amendments on existing laws, for the reason that the general schedule attached to these amendments provides, among other things, that "all laws then in force not inconsistent therewith shall continue in force until amended or repealed."

As said by this court in *Cass v. Dillon*, *supra*, "the new constitution of Ohio created no new state. It only altered, in some respects, the fundamental law of the state already in existence." So that it follows, particularly in view of the schedule specifically providing that all laws in force not inconsistent with the amendments shall continue in force until amended or repealed, that the people of this state, in adopting these amendments to our constitution, must have contemplated and intended that these general laws relating to municipal corporations, not inconsistent with the provisions contained in the constitutional amendments, should remain as the "general laws" provided for in Section 2, subject, however, to amendment, repeal and further legislation. So that, if it be contended that these general laws provided for in Section 2 must be passed by the general assembly of this state before the provisions of Section 3 shall go into effect,

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then the answer to that contention is that these general laws are already on our statute books, and therefore the full measure of that demand is met and satisfied. The folly of delaying the operation of Section 3 for further legislation is so apparent that it would seem that the people of Ohio could not have intended to predicate this substantial grant of power upon the mere possibility of legislative action. The present general laws may never be repealed or amended. No further general laws may ever be enacted. But whether they are repealed, amended or others enacted, that fact cannot change the constitution of the state or affect its operation.

Section 2 of Article XVIII further provides that additional laws may be passed for the government of municipalities adopting the same, and it has been suggested that when these laws are passed and adopted then the grant of power found in Section 3 may become effective. This is in line with the former proposition as to general laws, and I do not care to discuss it further, except to say that if either this or the former construction is to obtain, then the municipalities are still dependent upon the general assembly of the state to measure out to them their power and authority to control their own local affairs, and Section 3 of Article XVIII might just as well never have been written. Undoubtedly it was the intention of this article to change the existing condition of affairs and grant to municipalities directly the authority to exercise all powers of local self-government.

It would be unprofitable to discuss the fact that cities and towns existed and exercised powers of

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local self-government before the state was created. The fact remains that at the time of the adoption of this amendment municipalities were recognized as creatures of the state, possessing only such powers as the general assembly of the state chose to confer upon them; and it has been uniformly held, in Ohio at least, that municipalities had no power beyond the express powers granted to them by statute. It was this condition of affairs that this provision of the constitution intended to change, and this, I think, these amendments have accomplished. It would therefore follow that the provision of Section 2, authorizing the enactment of general laws for the government of cities and villages, and additional laws for the government of municipalities adopting the same, does not authorize the legislature to grant any powers to municipalities, or to expand the powers already granted by the people, or to fix any date or any condition precedent to the exercise of these powers. The grant of powers found in Section 3 is full, absolute and complete within itself. Therein is granted authority to exercise *all* powers of local self-government. Nothing further remains to be granted, and no authority is lodged anywhere, except in the donors of the grant, to impose conditions or delay the exercise of the rights conferred.

It is not suggested that any other section of this article, except Section 7, is in any wise related to Section 3, or in any way modifies the grant of power contained in that section. Yet, looking to all those other sections, we find that they are all declaratory of the rights of municipalities and are not dependent in any sense upon legislative action,

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except that Section 13 authorizes the passage of laws that limit the power of municipalities to levy taxes and incur debts for local purposes. So it would seem that if these other sections are independent of legislative action, Section 3 also is independent thereof.

Section 7 provides that any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government. This section does not purport upon its face to control the operation of Section 3. On the contrary, it does purport upon its face that this must be done subject to the provisions of Section 3. In other words, it clearly appears from the language used in Section 7, that Section 3 is the dominant section. Even if this did not appear, there is no language used in Section 7 that even suggests the necessity of a charter before the exercise of the powers conferred in Section 3. If the construction contended for by the respondent is to be given to this section, then it is necessary to read into it a mandatory provision that this charter must be adopted before municipalities can exercise the powers of local self-government. That is to say, such a construction would require us to read this section as if it were written in the following language: "*Before any municipality may exercise the powers of local self-government, it must* frame and adopt or amend a charter for its government." Suppose this section actually read in these words, would any contention be made here, or in any other forum, that without adopting a charter a city might nevertheless exercise these

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powers? And yet the construction asked would do as much violence to the language actually used as the other construction would do to the language suggested.

The language used in this section is just as plain and unambiguous as the language used in Section 3. It does not purport to create any conditions, but rather to grant a further privilege to municipalities to frame and adopt or, having so framed and adopted, amend a charter for its government, and then grants the authority to exercise under this charter all powers of local self-government; but particularly provides that this is all subject to the provisions of Section 3.

The impossibility of a construction of these amendments that would delay the exercise of these powers until a charter is adopted becomes apparent when we consider the condition of affairs that would obtain in this state under such a construction. Some municipalities would adopt charters and some would not. Those municipalities adopting charters would then derive their powers of local self-government from the constitution itself, while those municipalities not adopting a charter would still be dependent upon the general assembly of Ohio for authority to control their local municipal affairs. To determine the power and authority of cities not adopting a charter, we must look to the statutes of the state. For the power and authority of those adopting charters, we must look to the constitution itself. I cannot believe that such was the intention either of the framers of this amendment to the constitution or of the voters who adopted it. Undoubtedly it was in-

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tended that on and after the time fixed in the schedule for these amendments to go into effect, all municipalities of the state should stand alike and alike receive their powers directly from the same source; and not that part should receive their powers from the general assembly and part from the constitution itself.

Again, the schedule attached to Article XVIII reads as follows: "If the foregoing amendment to the constitution be adopted by the electors and become a part of the constitution, it shall take effect on November 15th, 1912." It would seem as if this positive provision of the schedule sufficiently evidences the intention of the people of this state when they wrote this amendment into their constitution. True, it may be said that that means only that on and after November 15, 1912, action might be taken to make all the provisions of Article XVIII operative. But when we look to the several sections of Article XVIII, we find that each and all of them are of such nature that they either declare a status or grant authority to do a particular thing. Certainly it cannot be successfully contended that where any provision of a constitution grants the authority to do a particular thing the doing or not doing of that particular thing affects in any manner the authority so granted. In other words, some of these sections authorize the general assembly to pass certain laws. That authority is complete on the day the amendment went into effect and any time thereafter the general assembly may exercise that authority. Other sections of this article provide that the municipalities may acquire, construct, own, lease and operate public utilities,

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and raise money for such purposes by issuing mortgage bonds for the purchase, extension or equipment thereof; and that any municipality may frame and adopt or amend a charter for its government. These things they could do immediately on and after the 15th of November. In fact the only thing that it is contended could not be done immediately on and after the 15th of November, 1912, is that municipalities could not and cannot exercise the powers of local self-government in pursuance of the grant contained in Section 3. The language of this section is just as plain and certain as the language of the other sections. The power is conferred absolutely and without condition, and I can see no reason whatever for selecting out this particular section of Article XVIII and saying that this shall not go into effect until certain other things are accomplished, but that all other sections in this article must be given immediate operation.

For these reasons I cannot concur in the first paragraph of the syllabus written by the majority of this court.

While this first paragraph of the syllabus practically disposes of the case before us and compels a refusal of the writ, yet undoubtedly the second paragraph of the syllabus deals with a proposition equally if not more important than the question covered by the first, and it is unfortunate indeed, that this question could not be settled authoritatively at this time. In view of the fact that I am of the opinion that Section 3 of Article XVIII of the Constitution grants full authority to municipalities to exercise all powers of local self-government without the aid of any legislation and without the

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necessity of adopting a charter as a condition precedent thereto, I would not consider it necessary to look to the statutes of the state to determine the powers and authority of municipalities, were it not for the holding of a majority of this court that Section 3 of Article XVIII has not yet become effective in the city of Toledo. If that is the correct view of this case, then, perhaps, it must be conceded that there is no statute now authorizing municipalities to purchase and operate a municipal moving-picture theater; but following the conclusion I have reached, that these statutes purporting to grant powers to municipalities are inconsistent with the amendment to the constitution and entirely superseded thereby, the question is not whether there is any statute conferring such powers upon municipalities, but rather whether the operation of a moving-picture theater comes within the powers of local self-government. This question perhaps involves much more doubt than the former and presents far greater difficulties in arriving at a satisfactory conclusion.

I do not believe that governmental purposes include only the protection of life, liberty and property. On the contrary, I am firmly of the opinion that one of the most important duties of the state is to promote the health, convenience, comfort and welfare of its citizens and advance the standard of citizenship in every legitimate way. But I do not believe it is within the purview of municipal government to invade the sphere of purely private enterprise wholly disconnected and divorced from public needs or public purposes. It is difficult, perhaps almost impossible, to prescribe a limit

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where governmental functions end and private enterprise begins. In the last quarter of a century our views on this subject have so changed that a limit fixed along the line of the prevailing opinion on that subject at that time would seem absurd now, and so it may be a quarter of a century hence.

As an index to what has been generally understood to be comprehended in the term "governmental powers," it is interesting to note that the general assembly of the state has heretofore conferred upon municipalities by statute the power to own and operate municipal lighting, power and heating plants; to provide for water supply, public grounds, parks and recreation centers; to hold property for charitable purposes; to establish municipal lodging houses, public baths and bath houses; to prevent the sale and distribution of vicious literature; to provide public libraries and reading rooms, to purchase books, papers, maps and manuscripts therefor, and to receive gifts and bequests of money for that purpose; and to maintain and regulate *public band concerts*. In addition to this, authority has been granted to municipalities to construct railroads, 66 O. L., 80; 67 O. L., 11; 77 O. L., 91; 79 O. L., 82; 76 O. L., 149; 76 O. L., 180; 89 O. L., 323; 88 O. L., 737; 87 O. L., 110; 89 O. L., 308; 94 O. L., 648; 88 O. L., 593; 66 O. L., 83; also to fill and improve lands for terminal facilities, 82 O. L., 143; to empower municipalities to erect machine shops and issue bonds to pay for them, 88 O. L., 8; 77 O. L., 155; 88 O. L., 5; 77 O. L., 292; 88 O. L., 199; 78 O. L., 103; 78 O. L., 39; 89 O. L., 28; 87 O. L.,

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108; 78 O. L., 51; 77 O. L., 7; 78 O. L., 146; 78 O. L., 60; 77 O. L., 193; also to construct glass works, 78 O. L., 67; 78 O. L., 24.

It is true that statutes authorizing municipalities to build railways have been held unconstitutional (*P., Ft. W. & C. Ry. Co. v. Martin*, 53 Ohio St., 386), but for the reason only that this legislation offended against Section 1 of Article XIII of the Constitution, which provides that "The general assembly shall pass no special act conferring corporate powers."

In the case of *Walker v. City of Cincinnati*, 21 Ohio St., 14, an act authorizing cities of the first class having a population exceeding 150,000 inhabitants to construct a railway, issue bonds for such purpose and levy a tax to pay such bonds, was held to be constitutional. In that case, however, the question whether the act then under consideration was a special act conferring corporate powers, was not made by counsel and was not considered by the court. It might also be added that Section 26 of Article II of the Constitution was also overlooked. However, the particular thing to which I desire to call attention is the pertinent fact that it was not even suggested in these cases, much less decided by the court, that the authority attempted to be conferred by these statutes did not come within the scope of governmental purposes.

It is a matter of general knowledge that practically all of the cities of this state, and of our sister states, maintain a public recreation department; parks are maintained and beautified for the pleasure and recreation of the people; music is provided for their entertainment; municipal lodging

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houses, baths and bath houses are maintained, as well as other things of kindred nature, all tending not only to the betterment of immediate conditions, but also tending to the creation of higher ideals, and consequently a better citizenship. In this capital city of our state, immediately following the disastrous flood on the west side, the recreation department provided at public expense a moving-picture theater for the benefit of the children of that unfortunate district until the schools could be reopened. Judge Dillon, in his work on municipal corporations, 5th ed., Section 21, calls attention to the fact that municipalities in Great Britain, in addition to the enterprises in which our American cities are engaged, also own and operate ice manufactories, buildings for entertainment and music; engage in the sale and distribution of milk; engage in brick-making; maintain buildings and dwellings for laboring men, and other kindred commercial and altruistic enterprises.

It has been suggested that if the purposes of this moving-picture theater are educational, then any attempt of the municipal authorities to appropriate public money for such purpose is unconstitutional, for the reason that such matters come directly within the control of the board of education. I do not think this view is correct. While I do not believe any municipality has the right to interfere with the established school system of this state, yet because a municipal project may be educational in effect is certainly no sound reason for holding that it does not come within the scope of the governmental

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powers of a municipality. The cities of this state, and the state itself, engage in many projects that are educational in their nature aside from the public school system, which is clearly within the control of boards of education.

It is further contended that this ordinance is in violation of Section 19 of Article I of the Constitution, which provides, among other things, that private property shall ever be held inviolate, for the reason that if municipalities are permitted to engage in such enterprises, private property may be confiscated by taxation. Section 13 of Article XVIII of the Constitution provides that laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes. This is full protection to the citizens and a complete answer to the suggestion. However, it may be said in passing, that if every beneficent purpose of government must be abandoned because taxes are to be levied upon some unwilling person, then we might as well prepare to abandon all plans of civic betterment, tear down our libraries and close our schools. It is said that it is of grave importance that public credit should be protected, particularly the credit of the municipal corporations of this state, and that the granting to municipalities the power to engage in such enterprises as this would impair that credit. This is a question largely for the municipality to determine, subject to the limitations of Section 13 of Article XVIII above referred to. Citizens should have enough interest in their own affairs to compel honest, efficient and economical administration of their local gov-

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ernment. But if it be granted that neither the vigilance of the people nor the provisions of Section 13 of Article XVIII are sufficient safeguards to protect municipal credit, then the further answer may be made that the people themselves make the constitution and the courts are but instruments also created by the people to give effect to that constitution, and that, therefore, it is not the province of a court to inquire as to the wisdom or the folly of any provision, either of the law or of the constitution, but rather to interpret and enforce the same according to the meaning and intent of the authority creating it. It is entirely possible that different minds honestly searching for the truth may arrive at different conclusions as to the construction of any written constitution or of any law. This is fairly demonstrated by the fact that the members of this court, who have been equally industrious, honest and intelligent in their efforts to arrive at the true meaning and purpose of this amendment to our constitution, having no purpose to serve except to arrive at the right, are, nevertheless, evenly divided as to one proposition, and but a bare majority concur in the other. The peace of the state demands that the controversy arising from such difference of opinion must be submitted to the arbitration of a court for final determination, and if perchance this court should err in its judgment, these constitutional amendments themselves provide a ready means for the correction of that error.

It is contended in the brief of counsel for relator that it is not the intention of the city to em-

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bark on a private money-making enterprise and that it is not about to engage as a competitor with enterprises operated exclusively for profit, but that, when such theater is established, it will be used in a strictly public sense, to promote the education and the patriotism of the citizens generally, and to advance the understanding and appreciation of the individual civic responsibilities of each citizen. If that is the fact, then these purposes should have been declared in the ordinance as the purposes for which the appropriation was sought to be made, without reference to the methods or the instruments to be used in the accomplishment of these purposes, but, so far as this ordinance reads, it may or may not be operated for any public purpose whatever. In fact, it does not appear from the ordinance itself that this moving-picture theater is to be established in the city of Toledo. If it is to be established without the city of Toledo, of course, that is the end of the controversy, for by no possibility could such an enterprise be held to come within the powers of local self-government. It is true the ordinance designates a "municipal moving-picture theater," and it might be argued that the use of the word "municipal" is sufficient indication that the theater is to be used for municipal purposes. But such things are not so common in Ohio that the mere use of the word "municipal" sufficiently defines or qualifies the nature and the purposes of the theater to be established. This designation, perhaps, is sufficient to show that it is to be established and operated within the limits of that city, and I think it only fair so to

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hold, but further than that no presumption obtains as to the purpose of this theater aside from these considerations; however, in the passage of this ordinance the municipal authorities entirely overlooked the general laws of the state now in force in reference to municipal corporations.

Section 2 of the act passed May 31, 1911 (102 O. L., 521), entitled, "An act to provide for the initiative and referendum in municipal corporations," provides, among other things, that no ordinance *involving the expenditure of money* shall become effective in less than sixty days after its passage.

Section 3 of this act provides that any act not included within those specified in Section 2 may be declared to be an emergency measure, and may go into effect immediately. This ordinance is one *involving the expenditure of money*, and one that, by the provisions of Section 2 of the act above referred to, shall not go into effect for sixty days after its passage. Therefore, the city council had no power or authority to declare this ordinance to be an emergency measure, to take effect immediately.

It is suggested that counsel have waived this defect. I do not understand either from briefs or oral arguments that any such waiver is intended or attempted. But whether it is attempted to be waived or not, it is sufficient to say that neither the auditor nor his counsel have any right or authority to waive the positive provisions of a statute designed for the protection of the taxpayer.

It is true this question is not of general importance, but the relator is asking for a peremptory writ of mandamus, and before such a writ

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can be issued its right to such a writ must be clear. Having held that these general statutes, not inconsistent with the amendment, are the general statutes contemplated and comprehended in the provisions of Section 2 of Article XVIII, it follows that to be consistent they must be given application to this particular case, but, of course, not for the purpose of evading the real questions presented.

For the reason, therefore, that this ordinance does not show on its face that this appropriation is for the public purposes mentioned in counsel for relator's brief, or any other public purpose, and for the further reason that the city council has no authority to declare a resolution or ordinance involving the expenditure of money an emergency measure, and for no other reason, I concur in the judgment refusing the writ.

WANAMAKER, J., dissenting. I decisively dissent, not only from the judgment in this case, but also the syllabus, as well as the majority opinion by which it is sought to sustain such judgment and syllabus.

A decent regard for the inherent importance of the questions involved and the widespread state and national interest in the same, as well as a due respect for the majority opinion, demand more than a brief statement of the grounds of disagreement.

Let us start from some generally admitted ancient landmarks as to which we are aptly admonished in the Ohio constitution of 1802, Section 18 of the Bill of Rights: "*That a frequent recurrence to the fundamental principles of civil*

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government, is absolutely necessary to preserve the blessings of liberty."

The cornerstone of American government is found in that fundamental principle: "*All political power is inherent in the people.*" Constitution of Ohio, 1802, Bill of Rights, Article VIII, Section 1; Constitution of Ohio, 1851, Bill of Rights, Article I, Section 2.

A few primary principles of political power and good government from the American viewpoint may furnish common ground for our consideration and help to clear some hazy notions as to political rights and powers, to the end that we may better understand the present status of our Ohio cities and villages.

In every American municipality to-day there are being exercised three distinct and differentiated kinds of political power:

First, municipal, that deals with purely municipal affairs; second, state, that deals with purely state affairs; third, national, that deals with purely national affairs.

The national power is now and always has been supreme in its own proper jurisdiction.

The state power is now and always has been supreme in its own proper jurisdiction.

The municipal power—*quaere*—but why not supreme in its own proper jurisdiction?

In point of time, which of these three great political powers was first in existence and operation—national, state, or municipal?

Manifestly, all must agree that we had towns, villages and cities exercising the powers of local self-government a long time before we had a

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state to exercise the state power or a nation to exercise the national power. This historic fact is so self-evident that it would seem unnecessary to support it by distinguished authority. However, to please those who pride themselves on precedent, let us note the following very eminent authorities: Cooley's Const. Lim. (7 ed.), 65; 1 McQuillin on Munic. Corps., 156; 1 Dillon (5 ed.), Sec. 14, *et seq.*; *C. W. & Z. Rd. Co. v. Commissioners*, 1 Ohio St., 77; *Cass v. Dillon*, 2 Ohio St., 630.

An even stronger case on the right of local self-government is that of *People v. Hurlbut*, 24 Mich., 45, and I specially enjoin upon all students of municipal rule to carefully read the very able opinions of the various judges in that case, especially Campbell's and Cooley's. I quote briefly from page 98:

"Our constitution has been adopted in view of a system of local government, well understood and tolerably uniform in character, existing from the very earliest settlement of the country, never for a moment suspended or displaced, and the continued existence of which is assumed; and, second, the liberties of the people have generally been supposed to spring from, and be dependent upon, that system. * * * The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful

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scrutiny of the charters of government framed by them, lest some time, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether."

If that be true as to the selection of local officers, how much more then would it be true as to the designation of powers that they might exercise? To the same effect, 28 Mich., 228.

If, now, we had and exercised municipal powers in matters of local self-government before we had a state and before we had a nation, how came we to lose those powers? Who took them away from us? Who perchance surrendered them, and to whom?

Is there, in the national constitution, any denial or limitation of the powers exercised by the many municipalities that were in existence all over the nation at the time and prior to the adoption of the national constitution? Certainly not.

The state constitution declares and defines the state powers, save as they are denied and limited by the national constitution. But does that same state constitution deny or limit the powers of local self-government in existence and in exercise by the cities and villages of the Ohio territory at the time the state was organized and the constitution adopted? If so, where is it provided that the power of local self-government henceforth, that is, after the adoption of the constitution, shall be denied or otherwise limited to the cities and villages of Ohio? Point out the article and the section.

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Our state constitutions are composed only of *delegated powers*. You say: "How do you know that?" Well, the constitutions themselves ought to be pretty trustworthy witnesses on that elementary proposition.

"To guard against the transgression of the high powers, which we have *delegated*, we declare, that all powers, not hereby *delegated*, remain with the people." Ohio constitution, 1802, Bill of Rights, Section 28.

"This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers, not herein *delegated*, remain with the people." Ohio constitution, 1851, Bill of Rights, Section 20.

If, now, any municipal powers were granted to the legislature or conferred upon it by the constitution, it would probably appear with tolerable clearness.

It is highly significant that there is no reference here whatsoever to municipalities, either as villages or cities. *They are not even mentioned anywhere in the constitution of 1802.* Hence, it cannot be said that the people intended in that constitution to deprive the numerous towns and villages of the state of their right of local self-government and transfer such right and power to the legislature. If such a radical departure from the then existing custom and law had been intended, is it not reasonable to suppose that there would have been at least some clear and apt constitutional reference thereto?

How about the Ohio constitution of 1851?

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The only reference in the constitution of 1851, that can possibly apply to legislative or state control of municipalities, is the following:

"Art. XIII, Sec. 6. The general assembly shall provide for the organization of cities, and incorporated villages, by general laws, and *restrict* their powers of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Clearly, this does not delegate to the general assembly the right to confer powers. It recognizes the powers as then being exercised by cities and villages, and merely provides that the general assembly shall provide for *organization* by general laws and *restrict* their power in the above respects so as to prevent the abuse of such power. *Cass v. Dillon*, 2 Ohio St., 623.

Does not this provision to "restrict" their power concede the power as already existing without a legislative grant?

What is meant by the word "restrict?" Does it mean prohibit? Does it mean deny? Or does it mean to give or grant, and then restrict? Nonsense!

"Restrict: to limit; bound; circumscribe; restrain; curb, or repress." Web. Int. Dict.

And when they wrote into the constitution the word "restrict," did they not in substance and effect provide that the legislature should exercise no other control over municipalities in respect to municipal powers?

When the Fathers came to frame and adopt the constitution of 1851, it would have been an easy matter then to have said that the municipalities

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shall exercise no powers save such as are granted expressly or impliedly by the general assembly, especially in view of the fact that the constitution of 1802 significantly omitted all reference to villages or cities.

But they did not say that. They simply gave the legislature power to *restrict* certain municipal powers, not to confer them, so as to prevent an abuse of those powers. How could they restrict a power unless it theretofore existed?

Again, I ask, how did we lose the municipal power that was formerly enjoyed and exercised by our municipalities under the common law?

The state legislature, for over a century, *has asserted and assumed, without constitutional right*, to be the source of all municipal power, and in this has been stanchly and overwhelmingly supported by our courts, which, together with a century or more of acquiescence on the part of the people, has built up a false system of political power unintended and unthought of by the Fathers in reference to municipal rule.

By reason of the many years of legislative invasion and usurpation of the powers of local self-government, believed by the Fathers to be wisely left to the towns and villages as they were exercising them at the time the several constitutions of Ohio were adopted, there developed in widely different portions of the state a movement to reclaim and restore this political power back into the hands of the people, to prevent further aggressions on the part of the legislature, and to give the cities and villages of Ohio now what they had before any

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constitution of the state was adopted, to-wit, full local self-government.

The legislatures of Ohio, sanctioned by our courts, have been responsible for this embezzlement of municipal power. Instead of standing on the original proposition that "all political power is inherent in the people," the legal and logical effect of the position of the legislature of Ohio has been, "No political power for municipalities is inherent in the people save what the legislature sees fit to give them."

To the average man, *all* political power means *all* political power, whether national, state, municipal, or otherwise. When the Fathers used this most comprehensive, qualifying word "all" would it be likely that they intended to except from it *municipal power—the one power above all others that they first exercised, and the one that most intimately and directly touched their own home affairs three hundred and sixty-five days in the year?* A mere statement of this proposition shows its absolute absurdity.

Our friends of the majority necessarily are forced into the position that "*the legislature is the reservoir of all political power as to municipal rule and authority.*" I can well conceive how that could be by special grant expressed in the constitution. But the grant of legislative power to the general assembly of Ohio was of state powers for state purposes, and not municipal power for municipal purposes and it did not include within its terms the surrender or deprivation of the municipal power that had always existed and had al-

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ways been exercised by the people *before we had legislatures, constitutions and states.*

The legislature was intended to do with the *forms* of government, *forms* of power, the *ways and means* of exercising and expressing them, as to powers actually delegated and nothing more.

Let us now proceed to analyze this Article XVIII. The intention of the dead man determines his will: the intention of living men should determine their will.

Paul, himself a great lawyer, but a greater master of language and logic, in his letter to the Corinthians, lays down a fundamental rule of construction that seems to fit the present case: "Who also hath made us able ministers of the new testament; not of the letter, but of the spirit: *for the letter killeth, but the spirit giveth life.*" 2 Corinthians, 3 ch., 6 v.

Looking now for the living potential will of the new constitution-makers and adopters, guided by Paul's doctrine of the spirit and purpose that giveth life, let us apply one more primary rule of Blackstone:

1. The old law.
2. The mischief to be avoided.
3. The remedy intended to be provided.

The old law, as applied by the legislature and sanctioned by the courts, was in substance that "municipalities have no power except such as given to them expressly or impliedly by legislative act."

Though this doctrine has no foundation in common sense, common law, or constitution, it has been passively acquiesced in for a century.

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Petition after petition addressed to the legislature, case after case decided by the courts, justified the hopelessness of home rule in local affairs through either of these sources. Accordingly application was made to the constitutional convention for a new declaration of independence for municipalities.

The constitutional convention, with great unanimity, in substance and effect declared that "*municipalities are and of right ought to be free and independent in their municipal affairs.*"

That this was their paramount and patriotic purpose there can be no doubt.

Did they accomplish that purpose for home rule, or shall it turn out at the last, by judicial interpretation, that this boasted independence and home rule is just no independence at all, and that the municipalities are still as hopelessly servile and subject to legislative control as ever, save and except that they may escape from further legislative interference or obstruction in the possibility of agreeing on some new charter for the village or city?

Did the people who asked bread get a brick, and that of the "gold" variety, too, all under the label on the ballot: "Municipal Home Rule?"

Is it possible that this home-rule amendment, so widely advertised through the constitutional convention and the campaigns that followed as a panacea for municipal ills, is, as a former statesman a half century ago declared, just a "barren ideality" as to all villages and cities that are unwilling or unable to adopt a new form of government under a charter?

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Over three million of Ohio's people are to-day living in more than one thousand cities and villages. A bare dozen have taken preliminary steps for a new charter. All the rest will still continue to be helplessly dependent upon either an adjourned or an unfriendly legislature.

The smaller cities and villages constitute the great majority of municipalities, and the probabilities are that they are quite content with their present *form* of government and will not adopt a new charter. Then it must follow that the great majority of villages and cities must make their appeal to the legislature, and be just as absolutely helpless and dependent as they were before we had a home-rule amendment.

While examining and analyzing this home-rule amendment, Article XVIII, we must ever keep in mind the *distinction between municipal power and state power*.

Section 3 reads: "*Municipalities shall have authority to exercise all powers of local self-government* and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

You will notice the italicized portion, which is clearly and absolutely a grant of full and immediate municipal power, unless the second part of this section, or some cognate sections, cut down or limit such power.

The second part of the section, "and to adopt such local police," etc., regulations, deals with a state power and *in no sense municipal power*. The police power of the state, whether pertaining

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to the public health or the public peace, has always been recognized by all authorities as essentially state police power. It is necessarily so. Why? Because we have riots disturbing the public peace, calling for the intervention of the state authorities, and we have epidemics requiring action of the state board of public health to protect neighboring and adjoining portions of the state. There can be no question about this grant of power being, in the first half of the section, a grant of *municipal* power to municipalities, and in the second half, a grant of *state* power to municipalities; the first unlimited in the section by the phrase "not in conflict with general laws," the second part of the section being limited by such phrase, because it relates to a general state power and hence should be in harmony with general laws conferring and governing such power.

✓ But some one says: I believe that "not in conflict with general laws" also qualifies the italicized part of Section 3. Well, if that be true, then municipal powers to-day are as absolutely under the control of the legislature as they were before the adoption of the home-rule amendment, and that, too, whether the cities adopt new charters or not. Why? Because the power of self-government provided for in Section 7 is the identical power conferred in Section 3. And if Section 3 must all the while and in all respects yield to general laws, it manifestly follows that Section 7 must do likewise.

"Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this

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article, exercise thereunder all powers of local self-government."

Certainly Section 7 in no wise cuts down the powers conferred by Section 3. It is nowhere provided in Section 7 that before powers of local self-government may be exercised under Section 3, a charter must first be framed and adopted. If it were so intended, is it not probable that some apt words such as, "before exercising the powers of local self-government as provided in Section 3, municipalities shall frame, or must frame and adopt, an amended charter for their government," as is provided in the home-rule provisions of the constitutions of California, Minnesota, Missouri, Michigan and other states? That would have made it perfectly clear if they had so intended. But they evidently did not so intend. The grievance to which this home-rule amendment was directed was not so much to the *forms* of government as to the *substance* of government; not to the officers who should exercise the powers, but to the fact that there was no power to exercise, save by grace of the legislature.

Again, if the charter must first be adopted before Section 3 shall become self-executing, isn't it strange that there is absolutely no limitation upon the kind of charter that the municipality may adopt? They may adopt anything that a majority see fit to adopt. It may be:

First, a most radical departure from our present form of government.

Second, it may be a slight amendment or alteration of the present form of government.

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Third, it may simply be a recodification of our present law pertaining to municipalities.

In either event, if the charter is adopted, according to the contention of the majority, home rule becomes at once available. In the last two classes of cases, though there is no substantial change in the political machinery for carrying out the provisions and exercising the powers under this amendment, still, because they got a paper writing called a charter, or a municipal constitution, a new spring political dress, so to speak, they may now exercise the municipal powers conferred by Section 3. But all the villages and cities which are unable to agree upon a charter, or are unwilling to make any change because of their satisfaction with their present municipal form, all these are denied home rule by this sort of judicial interpretation.

Section 2 of the amendment is not a restraint upon municipal corporations in any wise, except they shall be subject in the first instance to general laws as to their incorporation and preliminary government. The restrictions are rather upon the legislature suspending the operation of their laws until they shall be ratified by the people.

There is a section, however, of the amendment that does undertake to limit the municipal power of municipalities, and must be read in connection with Section 3 and Section 7. Section 13 reads as follows:

"Sec. 13. Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require re-

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ports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities."

It will be noticed that the legislature is here authorized to limit the municipal power of municipalities, if they see fit to do so, in certain respects, and they fall into two classes: (1) To levy taxes; (2) to incur debts for local purposes, and certain requirements as to reports, etc. The very fact that that is the only limitation put upon municipalities as to their municipal rule, invokes the old maxim: *expressio unius est exclusio alterius*. The very wording of this statute authorizing the legislature to limit the power concedes that the municipalities already have the power, but merely allows legislative regulation of the same in above respects.

If the above premises be true, the conclusion is irresistible that all municipal powers for local self-government, save the restriction to limit taxation and debt, as provided in Section 13 of the home-rule amendment, are now available to all municipalities in the state. The amendment is automatically self-executing, the executive or administrative powers to be exercised by the usual executive or administrative officers, and the legislative powers to be exercised by the council, which is made by statute the legislative body of municipalities.

The necessary legal and logical effect of the majority opinion in this case is to read into

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Section 3 the words at the beginning of Section 2, to-wit: "General laws shall be passed to provide" that municipalities shall exercise all powers of local self-government, etc., or the clause "laws shall be passed." The clause "as may be provided by law" and other similar expressions appear throughout these various amendments. The omission of it in Section 3 is strikingly significant.

The grand Old Roman, Judge Thurman, from whom I again quote, so rich in his rules of interpretation along the lines of common sense and the common law, used this language on page 623 of *Cass v. Dillon*, *supra*:

"Can it be believed" [which I quote with interpolation] "that, with the subject immediately before them," [then making the constitution, then just having framed Section 2, which made it dependent on legislative action] "with a section framed to meet it under consideration," [just having framed Section 2] "and with the strongest disposition to suppress the evil," [emancipate cities and villages from legislative control as to their local municipal affairs] "so far as policy required, the convention, through mere carelessness, failed to expressly prohibit what they intended to forbid; nay, more, by a change of phraseology, as striking as it is singular," [note the change between Sections 2 and 3, where in the former they provide for legislative control and in the latter omit it] "opened a wide door for saying no such prohibition was designed? Can it be believed that a prohibition so important was left to mere inference, when fewer words would have made it explicit, and that, too, after it had been openly

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asserted that the true inference was it did not exist?"

The striking omission from Sections 3 and 7, and every other section of this home-rule amendment, of clear, apt words expressing a plain intention of requiring some prior affirmative action, either by the municipality adopting a charter or the legislature giving a further grant of power, especially when those matters were all before the convention, obviously shows the absence of any such purpose or intention.

Throughout the convention and the campaign for the adoption of the constitutional amendments it was universally claimed that the home-rule amendment was automatically self-executing. What we know as men we can not unknow as judges. Construction of home rule must not lead to destruction of home rule.

The striking omission from Section 3 of legislative control as to municipal powers shows most clearly and conclusively that no legislative control as to the municipal power was in any wise intended and that the only control to be exercised was the state power as provided in the last half of that section. *The majority opinion simply amends this whole section, makes it speak and mean what it never was intended to speak and mean, and is therefore simply judge-made constitution.*

What was the spirit of 1911, that called for a new constitution?

What was the spirit of 1912, that framed and adopted the new constitution?

It was the spirit of Jefferson at Philadelphia, in 1776.

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It was the spirit of Lincoln at Gettysburg, in 1863.

It was the spirit of government for the people by the people.

And the convention wisely concluded that we could not get government for the people until we got government by the people. The legislature prevented such government of villages and cities for a century. Shall the courts now further prevent it for another century?

Would not the people have more confidence in our courts if our courts showed a little more confidence in the people?

Is a moving-picture theater a proper municipal public use?

What is a public use, and who may determine whether or not a given project is a public use?

Dillon on Municipal Corporations, at Section 21, Vol. I, 5th ed., says: "Cities and other municipalities in Great Britain are now to be found which own and operate street railroads, river steamboats, gas and electric light works, water-works, markets, slaughter-houses, cold-air stores, ice manufactories, bathing establishments, lodging-houses, *buildings for entertainments and for music*, and engage in the sale and distribution of milk, brick-making, etc., the building and renting of dwellings for laboring men, and other commercial and altruistic enterprises which, twenty years ago, were considered to be within the sphere of individual effort alone. The question whether it is expedient to embark in these enterprises has been referred to the people, and cannot be solved upon a philosophical or economic basis. *Munic-*

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ipalities have acquired the right to manage their own affairs, and the will of the voters, however mistaken, will determine what powers should be obtained and exercised. We therefore find an increasing diversity in the character of the public enterprises now undertaken by municipalities and a resulting complexity in their powers, rights, duties and obligations."

Since we have in all cities the initiative and referendum, known as the Crosser law, it is up to the people to determine in the first instance whether or not they want to "embark in these enterprises." They may permit the council to take the initiative, reserving the right to exercise the referendum upon the council's action, but under their own power of local self-government; it being strictly a municipal purpose, or at least a purpose which affects nobody but those within the municipality, legislated for by the municipality, paid for and operated by the municipality, who else has any right but those within the municipality to object? And they have their day in court, before the council, and before the people at the time the vote is being had.

The old parent case, often referred to, as to who may determine whether or not it is a public use, is *Goddin v. Crump*, 8 Leigh R., 120, in which it is said: "If then the test of the corporate character of the act is the probable benefit of it to the community within the corporation, who is the proper judge whether a proposed measure is likely to conduce to the public interest of the city? Is it this court, whose avocations little fit it for such inquiries? Or is it the mass of the people them-

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selves—the majority of the corporation, acting (as they must do if they act at all) under the sanction of the legislative body? The latter, assuredly.”

Judge Ranney, in *C. W. & Z. Rd. Co. v. Commissioners of Clinton County*, 1 Ohio St., 95, uses this language: “In accomplishing the lawful purposes of legislation, it must be admitted, that the choice of means adapted to the end proposed, and not prohibited by the constitution, must be left exclusively to the discretion of the legislative body.”

Manifestly, if this be true as to the state's legislative body, it must apply also to a municipal legislative body, unless prohibited by the constitution. Judge Ranney quotes with distinguishing approval the case of *Goddin v. Crump*, *supra*.

Manifestly, at least in the first instance, a municipality has the right to determine that matter for itself, and should not be interfered with in the exercise of its municipal power or its municipal government, unless the power sought to be exercised be so glaringly and palpably beyond the powers of local self-government that a court should say that the power was unauthorized and unconstitutional.

In the light of modern-day development of our modern-day municipalities; in the light of what municipalities in almost every foreign nation have done; in the light of what American municipalities hope to do; in the light of the genuine home rule which they believe was provided for under the new constitutional amendment, I am entirely free and frank to say, the exercise of such power on the part of the city council of Toledo was en-

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tirely lawful, fully authorized and ought not to be denied, in a case of this character, by this court.

The majority opinion written by Judge Shauck is a most able presentation of the doctrine involved in the judgment and syllabus, and if amenable to criticism at all, it is because it seems to be assumptive rather than analytic and argumentative, dogmatic rather than discriminating or discursive. The most significant thing about it is *not* "*what it does say*," but "*what it does not say*."

Ordinarily in a question of interpretation or construction of any written instrument, whether it be a contract between parties to a lawsuit, a bond, a deed, a will, a statute, or a constitution, the first step is to ascertain the will, the intention, the purpose, of the parties to such writing—the will of the parties as expressed in the statute, or in the provision of the constitution in question. It is rather remarkable that in this opinion, the word "intention," "purpose," or "will," is not even referred to, nor does any effort whatsoever seem to have been made to ascertain if possible from the language used what the intention, purpose or will of the constitution-makers, the delegates, or the constitution-adopters, the people, was in reference to the home-rule constitutional amendment. This rule of interpretation is so primary, so elementary, that certainly no authorities need be cited in support of it.

Two cases are cited in the majority opinion in support of the same. I want to call attention to them briefly.

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First, in *Cass v. Dillon*, *supra*, Judge Thurman says in the opinion: "*The constitution did not create the municipalities of the state, nor does it attempt to enumerate their powers. It recognizes them as things already in being, with powers, that will continue to exist, so far as they are consistent with the organic law, until modified or repealed.* Thus, there is no express provision that a county may make a road, or contract a debt, yet no one will doubt for a moment that it may do both. Indeed, its power to contract debt is recognized, beyond even the authority conferred by law. It is clearly assumed in Section 5, of Art. 8, that it may create debts to repel invasion, suppress insurrection, or defend the state in war, although no such power has ever been conferred by statute, so far as I can discover. If it can thus incur debts, it may, of course, levy taxes to pay them; notwithstanding its only express grant of the taxing power is, by Art. 10, Sec. 7, for 'police purposes.' *The same thing may be said of townships, cities, towns and villages.*"

I know of no better case in support of this dissenting opinion than the whole case of *Cass v. Dillon*, whether you read the majority opinion by Judge Thurman or the dissenting opinion by Judge Ranney. They both tell the same truth as to the political powers inherent in the people, in matters of local self-government in particular. I venture to stake this whole dissenting opinion upon this single case cited in the majority opinion.

In the dissenting opinion of *Cass v. Dillon*, Judge Ranney especially refers to the doctrine of delegated powers, which the majority opinion

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seems to lose all thought of in citing *State, ex rel.*, v. *Guilbert*, 56 Ohio St., 575. This is quoted as a reason why the state may not engage in the insurance business and, therefore, reasoning by analogy that it not being a proper public governmental purpose for the state, it must follow that a municipal picture show is not a proper public governmental purpose for a municipality, the court holding in the second section that the act providing for the registration of land titles in Ohio is repugnant to Section 19 of the Bill of Rights "because it attempts to authorize the taking of private property for uses that are not public, and without compensation."

If the *Guilbert* case has any virtue at all it must be because of the fact that the state's powers are all delegated powers, which the Fathers of the constitution and the jurists of early days all recognized as absolutely binding upon them. And there being no authority delegated in that constitution to engage in such business, it was therefore unlawful and unconstitutional.

But that cannot apply in the case of municipal government, because, as Judge Thurman has stated in the *Cass v. Dillon* case, municipal governments antedated state governments and national governments and exercise their common law powers with which they came into the state. The state constitution simply recognized them as in existence and operation, and there is nothing in the state constitution in any wise denying or limiting those powers, save and except as heretofore referred to in this opinion.

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I shall not make any further comment on the majority opinion save to say that I am entirely unable to see the relevancy of the "flood" argument.

As to the suggestion that if a moving-picture show were urged as a proper educational use it would be a matter for the board of education, I think it is sufficient to answer that if this doctrine be followed to its logical conclusion, it would result in the abolition of all public libraries owned and operated by the many municipalities of the state.

Counsel on both sides having advised the court to disregard the emergency feature of the ordinance, and the court having therein concurred, it is unnecessary to discuss that question in this case.

Courts themselves are largely responsible for the widespread criticism of courts. They too often invade the provinces of administrative and legislative officers without right or authority of law or constitution. They too often claim the right of judicial independence without according to the other branches of the government their proper independence. But an invasion of the rights and powers of the people in the making of a constitution, under the guise of judicial interpretation, is, to put it mildly, seriously to be regretted by reason of its impairing and undermining a proper public confidence in the administration of justice. The courts above all others should be the first and foremost, not to destroy, but to defend, the people's rights in their great charter of liberties, the Ohio constitution.

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The honored Harlan, of the supreme court of the United States, in the Standard Oil and Tobacco Trust cases, rendered a not only distinguished but immortal dissenting opinion. In that opinion the court's judgment was most severely criticised because of *judge-made law* in amending the Sherman act, under the *mask of interpretation*.

*"After many years of public service at the National Capital, and after a somewhat close observation of the conduct of public affairs, I am impelled to say that there is abroad in our land, a most harmful tendency to bring about the amending of constitutions and legislative enactments by means alone of judicial construction. * * * To overreach the action of Congress merely by judicial construction, that is, by indirection, is a blow at the integrity of our governmental system, and in the end will prove most dangerous to all. Mr. Justice Bradley wisely said, when on this bench, that illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from legal modes of legal procedure. Boyd v. United States, 116 U. S., 616, 635. We shall do well to heed the warnings of that great jurist." Standard Oil Co. v. United States, 221 U. S., 104.*

I regret that I am unable to adequately express my hearty endorsement of the wise and wholesome policy announced by Judge Harlan. If Judge Harlan's dissent is just condemnation of judge-made law, what is the proper measure of just condemnation of judge-made constitutions? The judge-made statute can be easily and readily amended, but the judge-made constitution is as

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permanent as the people-made constitution, and more, for it will probably have more protection from the courts.

Constitutional provisions are too often devitalized in the name of judicial construction. They are too often bled to death and nullified by judicial order and decree. Of what avail is the legislative or constitutional act if the teeth be all pulled out of it by judicial interpretation? The doctrine announced in the case at bar has not yet become the settled law of the state of Ohio. I have discussed this question at so great length, because I still indulge the hope that this court, with the aid of an enlightened public opinion, may finally settle the law along the lines of old landmarks, that all political power is inherent in the people and should be exercised by all branches of the government, not to destroy, but to defend, the people's rights and protect the people's powers.

DRISCOLL *v.* THE CINCINNATI TRACTION
COMPANY.

THE STATE OF OHIO *v.* TUTTLE.

*Judgment should not be reversed for misconduct of counsel, when—
Effect of retraction by counsel—And admonition of court—
Court procedure.*

1. A judgment should not be reversed for such misconduct of counsel for the prevailing party as tends only to discredit the administration of justice without subjecting the claim of the adverse party to prejudicial considerations not involved in the case. For misconduct of that character the trial court is authorized to apply more appropriate correctives.

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2. A judgment should not be reversed for misconduct of counsel for the prevailing party in alleging facts which no evidence tends to establish if from the nature of the case the retraction of counsel and the admonition of the court, it appears that the natural effect of the misconduct has been averted.

(Nos. 13778 and 13826—Decided May 6, 1913.)

ERROR to the Circuit Court of Hamilton county.
ERROR to the Circuit Court of Marion county.

Facts are stated in the opinion.

Messrs. Stricker & Johnson, for Driscoll;
Messrs. Kinkead & Rogers, for the traction company.

Messrs. Mouser & Maloney and *Mr. Charles L. Justice*, for the state; *Mr. H. E. Hill* and *Messrs. Crissinger & Guthery*, for Tuttle.

BY THE COURT. However wide may have been the difference between the original cases out of which these proceedings in error arose, judgments of reversal were rendered by the circuit courts in both cases because of the misconduct of counsel for the prevailing parties, and the propriety of the judgments of reversal should be tested by considerations which are substantially identical. In both cases the misconduct for which the circuit court reversed the judgments consisted of remarks, obviously improper, which counsel made in presenting the case to the jury. Remarks of counsel to jury always constitute misconduct when they either tend to diminish respect for the administration of justice or to subject the claims of the adverse party in the

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case to prejudice not warranted by the case actually presented for determination. But misconduct of the former character may constitute a very grave offense against the administration of justice without entitling the adverse party to a new trial if he suffers only in common with his fellows, all of whom are entitled to have proceedings in courts conducted with such decorum and propriety as to win the respect of all observers. For offenses of that character a new trial is an expensive and inappropriate remedy to which the judge of the trial court is not driven by any necessity, there being within his power modes of correction which will both secure the orderly conduct of procedure and avert the delays incident to mistrials. But for such remarks as naturally induce a jury to test the case of the adverse party by considerations not presented in or suggested by the evidence a new trial is the indispensable corrective if such improper effect is not averted by the court or counsel or both. The records show that misconduct of both kinds was committed in the trial courts in the present cases.

In the case firstly entitled, Miss Driscoll recovered a judgment in the trial court against the traction company for a personal injury alleged to have been received by her while a passenger on one of its cars caused by the negligent starting of the car by the conductor while she was in the act of alighting therefrom. In addressing the jury after the testimony had been adduced her counsel said: "Of course, he paid no attention to her. He rang the bell thinking she was off just as it happens every day, the car started before she was off and

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this accident happened." Assuming that evidence of other incidents of like character would have been competent there was no evidence of such other incidents in the case. Objection to the remark was promptly made by counsel for the company, in response to which counsel for Miss Driscoll as promptly said: "Gentlemen of the jury, disregard my remarks," and the court admonished them that the evidence to establish the facts of the case could come only from the witness stand.

It is entirely obvious that this observation of counsel unsupported by any evidence in the case tended to the prejudice of the defendant. What could be done to avert its natural effect was promptly done by both offending counsel and by the court. The withdrawal of the remark by counsel and the admonition of the court certainly informed the jury that the remark so improperly made should not have any influence whatever in determining their verdict. The proceedings of courts frequently require the conclusive assumption that jurors regard the instruction of the court as to matters of this character. If, over the objection of counsel for the traction company, evidence of other like incidents had been admitted and the court had subsequently concluded that the admission was improper and had directed the jury to disregard it, it would hardly be doubted that the instruction to disregard the evidence would have cured the error in its admission. And we cannot say, nor could the circuit court say, that effects of the improper remark of counsel remained in the case to operate to the prejudice of the defendant.

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In the same case counsel for the traction company requested several special instructions to be given to the jury which were given by the court. In his address to the jury counsel for the plaintiff referring to these special instructions, said: "They run in here a lot of charges that you want to watch very carefully." To this characterization of one of the appointed modes of getting instructions to juries, counsel for the defendant naturally objected. That it constituted misconduct can hardly be doubted, but that it would operate to the prejudice of the traction company in the case is not apparent. So that, as to the improper remarks firstly quoted, we think their effect should have been regarded as averted by the retraction of counsel and admonition of the court, and as to the observation lastly quoted, that it did not prejudice the defendant in the trial.

In the other original case, Tuttle was placed on trial upon an indictment for an assault upon a woman. In his defense much reliance was placed upon testimony tending to separate him from the assault by so short a distance that precision as to time was quite necessary. The witnesses upon this point were quite noticeably precise, and some of them explained their precision by testifying to their observation of the strokes of a clock in the neighborhood and their recollection thereof at the time of trial, although Tuttle was not accused for several days after the assault. It appeared from the evidence that shortly before the trial was entered upon counsel for the accused were in the neighborhood interviewing persons who were supposed to be informed as to his presence in that

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neighborhood at the time of the assault with a view to calling them as witnesses. There was no testimony in the case whatever to show that they took any improper steps to secure testimony. In the closing argument on behalf of the state to the jury, as we gather from a record that does not seem to have been very carefully prepared, counsel for the state made some insinuations against the propriety of the conduct of adverse counsel in that behalf. He was engaged at the time in pressing upon the attention of the jury the efficacy of suggestion in starting the belief that one has observed what in fact he has not observed and that he remembers what in fact he does not remember. The psychological law suggested is within the observation of all of us and comment upon it was strictly within the function of counsel for the state. To the proper effect of legitimate comment upon that subject no force would be added by insinuations against the propriety of the conduct of counsel for the accused, and the misconduct appears to be only an offense against the decorous administration of justice, but without special prejudice to the accused.

One cannot read records of this character without sincere regret that honorable and intelligent counsel should become so consumed with a desire for victory as to discredit the modes appointed by the law for the ascertainment of truths which are involved in the administration of justice. Extended comment upon these cases does not seem to be necessary. None of the counsel involved can think for a moment that those who observed the administration of justice in these cases bore away

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from the courtroom as much respect for the administration of justice as they had brought with them when they entered it.

But in view of the considerations suggested thus briefly, we think the misconduct did not, in either case, justify a judgment of reversal. In both cases the judgment of the circuit court will be reversed and the original judgment affirmed.

Reversed.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

BOEHMKE v. THE NORTHERN OHIO TRACTION COMPANY.

Plaintiff in action for damages—Sues defendant under mistaken name—Real wrongdoer voluntarily answers—Latter thereby submits himself to the jurisdiction of the court—And may be substituted as real defendant—Question of statute of limitations.

1. Where one knows himself to be the wrongdoer sought to be made liable in an action of damages for the wrong, and voluntarily appears by his attorney and answers in the name of and ostensibly as another person who was by the plaintiff named as defendant, and served with process in the mistaken belief that the latter person did the wrong, the former person thereby submits himself to the jurisdiction of the court and may be substituted as the real defendant in place of the nominal defendant sued by mistake; and the substituted defendant will be bound by the verdict and judgment rendered against him in the case.
2. The statute of limitations will cease to run from the time the real defendant appears and answers in name of the nominal defendant.

(No. 13147—Decided June 10, 1913.)

ERROR to the Circuit Court of Cuyahoga county.

Statement of the Case.

On September 25, 1900, the plaintiff entered suit in the common pleas court of Cuyahoga county against The Akron, Bedford & Cleveland Company, for damage for personal injuries received by him as he was about to enter a passenger car on the interurban electric railway, then known as The Akron, Bedford & Cleveland line. At ten o'clock of the night of August 19, 1900, he was upon a platform maintained by the railway company owning and operating the line, at the side of the track, for the use of passengers on its cars. The night was dark. The platform was level with the street which the railway crossed at this point, but the other end of the platform was four feet above the ground. The plaintiff walked forward, when the car came, to enter the smokers' compartment. The platform being shorter than the car, unlighted, and having no guard rail at the forward end, plaintiff stepped off and fell four feet to the ground and sustained a fracture of both bones of his right leg.

July 12, 1899 (before the date of the injury), The Akron, Bedford & Cleveland Company had been merged with the street railway company operating the Akron city lines, and the consolidated company thus formed was known as The Northern Ohio Traction Company, which on August 19th owned and operated the interurban line, but the interurban cars bore the name "Akron, Bedford & Cleveland," and the plaintiff and his attorneys believed that the company of the same name still owned and operated the railway when the petition herein was filed

Statement of the Case.

For brevity we now designate the two companies The A. B. C. and The N. O. T.

At the time of the merger the attorneys of The A. B. C. Co., Messrs. Ford, Snyder & Henry, became the attorneys of The N. O. T. Co.

Summons was served on The A. B. C. Co. by copy delivered to its president, H. A. Everett, September 26, 1900. The answer to the petition was filed October 13, 1900, *as the answer of The A. B. C. Co.*, but it was prepared and filed at the instance of The N. O. T. Co. by Ford, Snyder & Henry, formerly attorneys of the former company, now attorneys of the latter company, who signed as "attorneys for The A. B. C. Co.," though they were then under pay of The N. O. T. Co.

From that time till October 17, 1906, there were notices to, and continuances with the consent of, said attorneys, and a deposition was taken to which they appeared "as attorneys for The A. B. C. Co." On the last-named date the plaintiff moved for leave to amend the petition by substituting the name of The N. O. T. Co. as defendant in place of The A. B. C. Co. The leave was granted, The N. O. T. Co. objecting.

An amended petition was filed May 17, 1909, and the answer of The N. O. T. Co. was filed July 1, 1909, by Ford, Snyder & Tilden as "attorneys for The N. O. T. Co." The defenses set up are not material to the disposition of the case here. The first trial resulted in a verdict for defendant. A new trial was granted and a verdict was returned for plaintiff, upon which judgment was entered for \$2,000 and costs.

Argument for Plaintiff in Error.

Error was prosecuted to the circuit court, which reversed the judgment on the grounds: (1) That the common pleas court erred in permitting the substitution of The N. O. T. Co. for The A. B. C. Co. as defendant; and (2) "in ruling adversely to defendant on the agreed statement of facts with respect to the plea of the statute of limitations."

Messrs. Ong, Thayer & Mansfield, for plaintiff in error.

As the court of common pleas ordered the substitution of The N. O. T. Co. for The A. B. C. Co., reserving only the question of jurisdiction so to do, and no bill of exceptions was taken thereon, the only question which arises on this point concerns the power of the court to make such substitution. *Caldwell Furnace Foundry Co. v. The Peck-Williamson Heat. & Vent. Co.*, 6 C. C., N. S., 629, 76 Ohio St., 585; *Lee v. Benedict*, 82 Ohio St., 302.

The court had power to make such substitution. *L. S. & M. S. Ry. Co. v. Elyria*, 69 Ohio St., 414; 1 Bates' Pleading (2 ed.), 140-144.

By the consolidation of the two companies, the old ones were extinguished. *Compton v. Railway Co.*, 45 Ohio St., 615; *Lee v. Sturges*, 46 Ohio St., 169; *Ashley v. Ryan*, 49 Ohio St., 529; *Shields v. Ohio*, 95 U. S., 319.

We insist that The N. O. T. Co. was carrying on the defense of this case in the name of a fictitious party, which would not only of necessity make The N. O. T. Co. the real party to the case, but would even as to it make the judgment therein *res adjudicata*. *Roby v. Eggers*, 130 Ind., 416;

Argument for Defendant in Error.

Claffin v. Fletcher, 7 Fed. Rep., 851; 2 Black on Judgments (2 ed.), Sec. 539.

The court had power to permit amendments to pleadings by striking out or adding the name of any party "in furtherance of justice." Section 5114, Revised Statutes.

Such amendments are proper, and take effect as of the beginning of the original case. *Lilly v. Tobbein*, 103 Mo., 477; *School Town v. Grant*, 104 Ind., 168; *Railroad Co. v. Bills*, 118 Ind., 221; *Snider's Exrs. v. Young*, 72 Ohio St., 494.

Messrs. Ford, Snyder & Tilden, for defendant in error.

The plaintiff in error says that after the consolidation of The A. B. C. Co. with another company on July 12, 1899, it was no longer in existence; that it could not sue and be sued; that it had no actual existence and was a mere fiction.

The old companies are declared to be in existence so far as is necessary to preserve the rights of their creditors, and they may sue and be sued. *Compton v. Railway Co.*, 45 Ohio St., 592; *Harris v. C. H. & D. Ry. Co.*, 16 O. D., N. P., 653.

The legislature having provided certain specific cases when the statute begins to run, from the discovery of the wrong, in all other cases the statute begins to run from the date of the wrong, and not from the date of its discovery, even though it may have been fraudulently concealed. *Fee's Admr. v. Fee*, 10 Ohio, 470; *Howk v. Minnick*, 19 Ohio St., 462; *Williams v. Pomeroy Coal Co.*, 37 Ohio St., 583; *State, ex rel., v. Standard Oil Co.*, 49 Ohio St., 137; *A. T. & S. F. Ry. Co. v. Atchison*

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Grain Co., 68 Kans., 585; Wood on Limitations, (3 ed.), Sec. 276.

WILKIN, J. Section 3384, Revised Statutes (the law at the time of the amalgamation), provides as follows:

Upon the election of the first board of directors of the company *created by the agreement of consolidation*, the rights, privileges and franchises of such company and all the property, and debts due on account of subscriptions of stock or other things in action, *shall be deemed* to be transferred to and vested in such new company, all property and other interests shall be effectually the property of the new company as they were of the parties to the agreement * * * but all *rights of creditors, and all liens upon property of either* shall be *preserved unimpaired*, and the *respective companies may be deemed to be in existence to preserve the same*; and all debts, liabilities and duties of either shall thenceforth *attach to the new*, and be enforced against it as if such debts, liabilities and duties had been contracted by it.

The consolidation or absorption of The A. B. C. Co. into the defendant company, though in fact a dissolution of the constituent company, did not destroy its existence in contemplation of law for one purpose. It is deemed still to have a being to answer the suit of its creditors; the legal entity survives the merger, with its property, for this purpose.

Such seems to be the rationale of the case of *Compton v. Railway Co.*, 45 Ohio St., 592.

But the opinion in that case refers to this legal conception as a *fiction* of the chancellor to protect creditors.

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This seems necessarily to involve the idea that the merger of the two companies is nevertheless an actual blending of the absorbed and the absorbing corporations into one composite legal person. The notion of separate entity is only a figment of the mind, not appropriate to the case at bar, for the tort-obligor here is The N. O. T. Co., not The A. B. C. Co.

The composite or consolidated company, by express declaration of the statute, is liable for the obligations of the component companies. So that if a judgment had been taken in the case against The A. B. C. Co., that judgment would have immediately become the obligation of The N. O. T. Co. Therefore The N. O. T. Co. had an interest in the case, to defeat a recovery.

The determinative question is: Did the latter company appear in the case?

Stipulation No. 11 in the agreed statement of facts signed and filed in the suit by the plaintiff and the now defendant, The N. O. T. Co., gives the answer to this question. By that stipulation The N. O. T. Co. admits that the answer which its attorneys filed in the case was only *ostensibly* the answer of The A. B. C. Co.; that The N. O. T. Co. requested its attorneys to prepare and file the answer, and paid them for that service. The inference is that the service was rendered for The N. O. T. Co. at whose instance it was performed, and that the service was for the benefit of the latter company, which paid for the service, to defend it from liability for its own wrong.

The conclusion, therefore, must be that the attorneys for The N. O. T. Co. who appeared only

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ostensibly for The A. B. C. Co., which was sued by mistake, appeared *in fact* as attorneys for and in behalf of The N. O. T. Co.

Our statute of amendments is very liberal. In furtherance of justice the court may amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party or a mistake in any other respect. Section 11363, General Code.

The real party who did the wrong complained of was in court. It operated the railway on which it invited the plaintiff to become a passenger, under the name A. B. C. published on the cars. The plaintiff naturally mistook The A. B. C. Company for the owner and operator of the railway, and sued it for his damage instead of The N. O. T. Co., the real party responsible for his injury.

The court was right in amending the proceeding by substituting the name of the real defendant for whom its own attorneys appeared and made the defense for it in fact, though *ostensibly* for the company which was sued by mistake and whose legal personality, franchises, assets and obligations it had absorbed.

Having voluntarily come into court, though in the guise of The A. B. C. Co., and filed an answer in its own defense, though ostensibly for the nominal defendant sued by mistake, The N. O. T. Co. stopped the statute of limitations from running in its favor during the long period it graciously permitted the case to be continued in the false hope that the bar of the statute would ripen.

The clever argument made by counsel for defendant in error is that The N. O. T. Co. was free

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to let the plaintiff deceive himself to the end of time; it was not the defendant's duty to "undeceive" him. True; and counsel frankly state that the defendant was aware of plaintiff's mistake but contributed in no way to that mistake. True, also. But that mistake became a mere *irregularity* in the judicial formulary of the suit when the real party came to the defense wearing the mask of the formal party. A court of law is a dangerous place for masquerade, for the law looks beneath the apparent and beholds the real.

Counsel naively assert that The N. O. T. Co. had a perfect right to employ counsel to defend for The A. B. C. Co. Yes; but at the risk of being substituted as soon as the plaintiff discovered he had sued the wrong company and that the right one was in court defending. Counsels' mistake was in thinking their client could enjoy the privilege of defending a lawsuit and dodge the responsibility that goes with it.

Assenting to the plaintiff's mistake, the defendant accepted the suit and thus cured the irregularity. "*Consensus tollit errorem* is a maxim of the common law and the dictate of common sense," says Broom, citing Coke, "for *qui tacet consentire videtur.*"

The defendant's innocent mistake of law neatly and effectually corrected the plaintiff's innocent mistake of fact, and repaired the defect in the title of the suit.

Judgment of the circuit court reversed and that of the common pleas affirmed.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

Statement of the Case.

THE STATE, EX REL. MAHER, PROSECUTING
ATTORNEY, v. BAKER.

Remedial statutes should be liberally construed—Moneys paid into county treasury—For construction of county ditch are public moneys, when—Duty of prosecuting attorney to recover excess paid on ditch contract, when—Sections 4447 and 1277, Revised Statutes, and 6443 and 2921, General Code.

1. Remedial statutes should be liberally construed so as to furnish all the remedy and accomplish all the purposes intended by the statutes.
2. Moneys paid into the county treasury by virtue of proceedings for the location and construction of a county ditch in conformity with Section 4447, *et seq.*, Revised Statutes, and Section 6443, *et seq.*, General Code, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code. (Overruling *Loe v. State, ex rel.*, 82 Ohio St., 73.)
3. It is not only the right but the duty of the prosecuting attorney to bring and maintain an action to recover from any contractor for the construction of such ditch any amount received by him in excess of the amount stipulated in the contract.

(No. 13119—Decided June 10, 1913.)

ERROR to the Circuit Court of Darke county.

Plaintiff filed in the common pleas court of Darke county, Ohio, the following amended petition:

“Comes now John F. Maher as the duly elected, qualified and acting prosecuting attorney of Darke county, Ohio, and brings this action as such prosecuting attorney, in the name of the state of Ohio and for the use and benefit of Darke county and its taxpayers, and further says:

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"That on or about the ninth day of June, A. D. 1906, one Abe Oda entered into a written contract with the county surveyor of Darke county, Ohio, for the construction of a portion of Bridge creek ditch improvement, and which written contract was duly approved by the board of county commissioners of Darke county, Ohio (a copy of said contract is hereto annexed marked Exhibit 'A'). That the said Abe Oda duly entered into a bond for the faithful performance of said contract as provided by law with the said Ezra Baker and E. E. Studebaker and Samuel Dull as sureties; that thereafter the said Oda failed and neglected to complete said improvement and to perform his said contract according to the terms thereof, and the said Ezra Baker, defendant herein, as such bondsman, undertook to complete the said contract; that thereafter, to-wit: March 18, 1907, the board of county commissioners of said Darke county modified the specifications of the said contract whereby the grade was raised one (1) foot from the outlet of said ditch to the road on the section line between sections fourteen (14) and twenty-three (23) in Neave township; that the said written contract and specifications provided among other things as follows: 'There shall be added or deducted from the contract price, accordingly, as the change required more or less labor or material.' That by reason of the said change in the said specifications less labor was required to complete the said contract and the said Ezra Baker did thereupon complete said contract according to said change in said specifications, and that the said county surveyor, in charge

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of said ditch, in making a final estimate upon said improvement and his certificate therefor, to the said Ezra Baker, deducted from the original contract price the sum of \$597.75, the said amount being the value of labor saved, calculated *pro rata* upon said original contract price, from being performed by reason of said change in said specifications.

“That thereafter the said Ezra Baker presented a certain bill to the said county commissioners for the said amount of \$597.75, which bill was *false, fraudulent and fictitious* and said Darke county had received no services, property or other things of value therefor from the said Ezra Baker nor any one for him; that about September 21, 1907, the said then county commissioners undertook and pretended to allow said false and fictitious bill in the sum of \$497.75; that at said time the legality of said bill had not been approved by the prosecuting attorney of said county, and was never thereafter so approved by the prosecuting attorney. Nor at said time had the said county surveyor, engineer in charge of said ditch improvement approved the said bill, and that the then auditor of Darke county, Ohio, upon the direction and order of the prosecuting attorney, refused to issue a warrant in payment for the said bill or in any part thereof.

“That a long time thereafter, to-wit: December 2, 1908, the said Ezra Baker procured the then auditor of said county to issue a warrant upon the county treasurer for said amount, which warrant is in the words and figures following, to-wit:

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'Series P.

\$497.75.

'AUDITOR'S OFFICE, DARKE COUNTY, OHIO,

'Greenville, Ohio, December 2, 1908.

'The Treasurer of Darke County:

'Pay Ezra Baker, or order, four hundred ninety-seven and 75-100 dollars for final estimate on Bridge creek ditch improvement out of the ditch funds, by order of comrs.

'No. 1675.

FRANK SNYDER, *Auditor.'*

"That thereupon the said Ezra Baker presented said warrant to the county treasurer and received thereon public moneys of Darke county, Ohio, from the said treasurer in the sum of \$497.75; that at said time there was not any money due and owing the said Ezra Baker from Darke county, Ohio, in the sum of \$497.75, or any other sum whatever, and that the said payment of said money to the said Ezra Baker and the receipt thereof by him, was at the time illegal and unwarranted.

"That the county of Darke, as a corporate entity, was and is interested in the said Bridge creek ditch improvement and the said Darke county was assessed and did pay in the construction of said improvement the sum of \$390, and said county was and is an interested taxpayer in said improvement.

"That by reason of the premises above set out, there is now due the said Darke county, Ohio, from the said Ezra Baker the said sum of \$497.75, together with six per cent. thereon from December 2, 1908.

"That due demand has been made upon said Ezra Baker for the payment of said sum and interest and which demand has been ignored.

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"Wherefore, said plaintiff prays judgment against the said Ezra Baker, in the sum of \$497.75, together with six per cent. interest from December 2, 1908, for the use of said Darke county, Ohio, and costs herein and all proper relief."

To this amended petition the defendant interposed the following demurrer:

"By leave of court, on the application of said defendant, the motion heretofore filed by him having been withdrawn, the said defendant comes now and demurs to the amended petition herein for the reasons:

"1. That said plaintiff has not legal capacity to sue.

"2. The said amended petition does not set forth facts sufficient to constitute a cause of action herein."

Upon hearing, the common pleas court sustained the demurrer to the amended petition and plaintiff not desiring to further amend, judgment was entered in favor of the defendant.

Thereupon plaintiff prosecuted error to the circuit court, which affirmed the judgment below.

Error is here prosecuted to the judgments below.

Mr. John F. Maher, prosecuting attorney, and *Mr. O. R. Krickenger*, for plaintiff in error.

Messrs. Robeson & Yount and *Mr. D. W. Bowman*, for defendant in error.

WANAMAKER, J. The case at bar is for the recovery back of money claimed to have been unlawfully paid out of the county treasury by virtue of Section 2921, General Code, upon the state of facts set forth in the petition, which, boiled down, are substantially as follows:

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Ezra Baker was surety upon the bond of one Abe Oda, who became a contractor for the construction of a ditch improvement known as the Bridge creek ditch improvement; that Oda became unable to carry out this contract and the defendant Ezra Baker took the contract and proceeded to execute it; that in the course of the work the county commissioners changed the specifications so as to materially reduce the amount of work; that the written contract provided among other things that where a change is made there should be added to or deducted from the contract price accordingly as the change required more or less labor or material; that under this provision of the contract the engineer in charge of the work made an estimate of the amount that Baker was to receive; that this estimate was \$497.75 less than the contract for the original work; that the amount of this estimate was allowed and paid by the commissioners; that subsequently Baker presented a bill to the commissioners for the additional amount of \$497.75, which was allowed by the commissioners; that an order or warrant was drawn in favor of Baker by the auditor upon the treasurer in the following words and figures:

“Series P. \$497.75.

“AUDITOR’S OFFICE, DARKE COUNTY, OHIO.

“Greenville, Ohio, December 2, 1908.

“*The Treasurer of Darke County:*

“Pay Ezra Baker, or order, four hundred ninety-seven and 75-100 dollars for final estimate on Bridge creek ditch improvement out of the ditch funds, by order of Comrs.

“No. 1675. FRANK SNYDER, *Auditor.*”

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Thereupon the said Baker presented said warrant to the county treasurer and received thereon public moneys of Darke county, Ohio, from the said treasurer in the amount of the warrant; and that at said time there was not any money due or owing the said Baker from Darke county, and that the said payment of said money to said Baker was at the time without any warrant or authority of law.

The questions involved in this case are substantially the ones raised by the demurrer to the amended petition.

1. Has the plaintiff legal capacity to sue?

2. Does the amended petition set forth facts sufficient to constitute a cause of action?

It is conceded by counsel on both sides of this case that this action depends very largely upon the interpretation to be given to Section 2921, General Code. The statute reads as follows:

"Upon being satisfied that funds of the county, or public moneys in the hands of the county treasurer or belonging to the county, are about to be or have been, misapplied, or that any such public moneys have been illegally drawn, or withheld from, the county treasury, or that a contract in contravention of law has been, or is about to be entered into, or has been or is being executed, or that a contract was procured by fraud or corruption, or that any property, real or personal, belonging to the county is being illegally used or occupied, or is being used or occupied in violation of contract, or that the terms of a contract made by or on behalf of the county are being or have been violated, or that money is due the county, the

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prosecuting attorneys of the several counties of the state may apply, by civil action in the name of the state, to a court of competent jurisdiction, to restrain such contemplated misapplication of funds, or the completion of such illegal contract not fully completed, or to recover, for the use of the county all public moneys so misapplied or illegally drawn or withheld from the county treasury, or to recover, for the benefit of the county, damages resulting from the execution of such illegal contract, or to recover, for the benefit of the county, damages resulting from the non-performance of the terms of such contract, or to otherwise enforce it, or to recover such money due the county."

What is the common-sense construction of this statute as applied to the facts of this case?

In construing any written instrument, whether it be a will, contract, statute, or constitution, the primary and paramount rule is: What was the intent or purpose of the makers of such written instrument? And it is conceded to be the almost universal law that that intent or purpose shall be chiefly gathered from the language employed in such instrument.

If it be a penal statute that is under consideration, it is to be strictly construed in favor of the persons to be punished. If it be a remedial statute, it is to be liberally construed in favor of the persons to be benefited.

The strict construction, however, must not squeeze out the lifeblood of the statute, nor should the liberal construction result in the exercise of the legislative power of amendment under the mask of so-called interpretation. In short, it is not

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the proper province of the court to add to or subtract from the intended meaning and scope of the statute. In any case, the interpretation should be reasonable, consistent with the language used, and conducive to the purposes to be accomplished by the enactment of the statute.

What was the intention of the lawmakers who made this statute? What was their purpose in passing it?

Upon the most superficial reading of this statute, can any fair-minded person, in the light of common sense as well as the common law, doubt that the design and purpose was to protect the public in their contracts, their property and their moneys?

If not, what was it?

An analysis of the foregoing Section 2921, General Code, discloses the following classification with reference to the moneys or funds specified in the statute, to-wit:

1. Funds of the county.
2. Public moneys *in the hands of the county treasurer*; or
3. (Public moneys) *belonging to the county*.

It is claimed on the part of the defendant that by reason of the fact that the money paid Baker was for the balance of the contract price for the construction of a ditch improvement, which ditch was ultimately paid for by the adjacent and abutting owners who are benefited by the improvement, through assessments duly made upon their several lands, the moneys in question were not public moneys, or county moneys, as specified by the statute, but that they were in truth and in

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fact private moneys belonging to the parties assessed for the construction of the ditch.

It is therefore contended by the defendant that if there was any remedy in anybody to recover back such money so wrongfully paid out, it would not be in the prosecuting attorney for and on behalf of the county, but in some party assessed for the ditch in behalf of himself and others who were likewise severally assessed, and that, therefore, the plaintiff had no capacity to sue.

As to classes one and three above cited, to-wit: (1) Funds of the county, and (3) public moneys belonging to the county, there might be at first blush some doubt in the strict and literal meaning of the words designating the funds. Still, even applying the strictest rule of construction, it must be conceded that the funds in question upon which the warrant was drawn, or out of which the warrant was paid, were then in the custody of the county.

The county, therefore, was the bailee of these funds at the time and had therefore their rightful custody, if for no other purpose, as a disbursing agent, or as a political subdivision of the state exercising certain administrative functions conferred by law.

Manifestly the bailee has a right to protect his funds while they are rightfully in his custody, and, if necessary, may do so by a suit at law or in equity, the more so where the power is directly conferred by statute.

Suppose, for instance, these funds had been stolen and the indictment charged that the money was the property of said Darke county, Ohio. and

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upon the trial it should turn out that this was money in the custody of the people of the county arising out of the ditch assessments, and that, therefore, they were not properly, really, or strictly, county funds or public moneys, but that the county simply had the right of possession as a bailee. Would there be any question but that the thief could be convicted of larceny notwithstanding the fact that the indictment alleged the ownership of the property absolutely and unconditionally in the county?

Certainly not. The books are full of just such cases.

If ownership of the property in a larceny prosecution may be pleaded and proved in the bailee as the real owner, much more so in the ordinary civil proceeding to recover back money may the ownership of property be pleaded and proven in the bailee as owner.

Conceding for the purpose of this case that the fund out of which the warrant was paid was a fund raised by ditch assessment (though neither the petition nor the warrant discloses whether it was ditch funds raised by general taxation or taxation of the persons benefited in the neighborhood of the ditch), what was each contributor's interest in said fund after he had paid his assessment into the county treasury?

Had such contributor not fully and eternally lost all control, dominion and interest in said fund? Had he not absolutely parted with his property in the same? Indeed, has it not been repeatedly held by courts without number that if after payment of the assessment the law under which the ditch

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was constructed or the assessment made was held unconstitutional the assessment cannot be recovered back unless payment was made under a proper protest? 30 Cyc., 1315.

Title to those moneys must be somewhere and in somebody. It is not in the contributors to the fund. Where else can it be than in the county or its agent, the county treasurer?

Irreverent as it may seem to some, courts after all are but the people's agents in the transaction of public business.

If agents in the transaction of private business use their power against their principals' interests, we know what speedily happens. Why should there be any less fidelity in the transaction and protection of the public business by our courts?

The purpose, phrasing and power of the statute all happily combine to protect the people's purse and property and to protect and promote official honesty. Our construction should defend and not defeat the sound statesmanship of this statute.

The legislature, however, seemed to anticipate that some court might interpret this statute with superlative strictness upon the question of ownership, and therefore they put in another class: (2) Public moneys *in the hands* of the county treasurer.

Does anybody doubt that this money paid to Baker was, before the payment by the county treasurer, *in the hands* of the county treasurer?

No doubt, by a splitting of frog hairs, it could be urged with equal force that it was not *in the hands* of the county treasurer but that it was *in the vaults* of the county treasury. This is the

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kind of construction wherein the letter killeth but the spirit giveth life.

Authority for the judgments below is claimed by virtue of the case of *Loe v. State, ex rel.*, 82 Ohio St., 73. The syllabus reads as follows:

“Moneys which are paid into the county treasury by virtue of proceedings for the location and construction of a county ditch in conformity with Section 4447 and cognate sections of Revised Statutes, are not ‘funds of the county,’ nor ‘public moneys in the hands of the county treasurer belonging to the county,’ within the meaning of Section 1277, Revised Statutes; and where one who has contracted for the construction of all or a part of a county ditch has been fully paid by the county treasurer on warrants issued to such contractor by the county auditor, when the work of construction so contracted for was but partially performed, the prosecuting attorney is not authorized by said Section 1277 to bring and maintain an action to recover back from the contractor the amount received by him in excess of the work actually performed.”

It will be observed that as far as the essential facts are concerned the cases are on all fours. The syllabus of this case, however, overlooked one very important distinction in the language of the statute, and that is the second class above referred to: “Public moneys in the hands of the county treasurer.”

The legislature evidently intended that not only public moneys *belonging to the county* might be recovered in a suit at law, but public moneys *in the hands* of the county treasurer were also to be

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recoverable in a suit at law. The latter class of public moneys seems to have been overlooked in the Loe case.

How public must money be before it is public enough to be embraced in this statute?

In the first place, we take it that a county ditch is certainly a public matter. Section 6443 *et seq.*, General Code; Section 4447, *et seq.*, Revised Statutes, all recognize it as a public matter. It is petitioned for by the public. The petition itself recites that the improvement is for the "public health, convenience and welfare," and the commissioners must so find upon their journal before the ditch may be constructed. The petition is addressed to the board of county commissioners. The legislation from one step to another is conducted by the board of county commissioners, the viewers appointed by them, and the county surveyor. The assessments are made by public officers and collected by public officers. The contract is let and supervised by the public officers. And yet it is seriously contended that it is a private transaction, or, at all events, the moneys in the hands of the county treasurer arising from this improvement and assessment upon the abutting landowners, is not within the scope, purpose and limitations of the statute.

The record does not disclose how many individual people were assessed for this improvement. But evidently there was a considerable number in the neighborhood of the ditch. Enough at all events to invoke the jurisdiction of the public authorities to legislate upon and construct a public improvement. And it would be folly to

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say that in order to protect the fund arising from this improvement the public officers who assessed and collected it were powerless to protect it from crooks, criminals and plunderers, and that the same might be converted to private use by embezzlement and the public authorities be powerless to prevent or punish.

From time immemorial ditches have been recognized as proper public uses. It would seem by a parity of reasons and logic that the funds contributed, no matter by whom, and paid into the public treasury would thereby become public funds within the meaning of the statute. So that we have "public" as a word of qualification and characterization not only as to the use but as to the funds necessary to pay for the use.

Lest some, however, be in want of authority of other courts upon the question and meaning of the word "public" in this connection, the following are cited:

"The term 'public' does not mean all the people, nor most of the people, nor very many of the people of a place; but so many of them as contradistinguishes them from a few." *State v. Luce*, 9 Houst. (Del.), 396, 399, 32 Atl. Rep., 1076; *United States v. Luce*, 141 Fed. Rep., 385, 392. 32 Cyc., 747 *et seq.*; *Thomas v. County Commissioners*, 5 N. P., 449, 5 O. Dec., 503.

The interpretation necessary to sustain the judgments below is of the sort that bleeds statutes to death and pulls the teeth out of remedial laws not only designed, but absolutely essential, to protect the public interests and safeguard the public funds. We desire to squarely and distinctly

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disapprove and reverse the case of *Loe v. State, supra*, so far as it relates to the case at bar.

Aside, however, from the construction of the statute as aforesaid, we believe that the petition itself stated a good cause of action when it averred the language of the statute as follows:

"That thereupon the said Ezra Baker presented said warrant to the county treasurer and received thereon public moneys of Darke county, Ohio, from said treasurer in the sum of \$497.75."

Here was a square, straight declaration that it was public money of Darke county, Ohio, that had been paid out.

Clearly this, in the first instance, brought the petition squarely under the language of the statute above cited even under the *Loe* case.

But we have not been disposed to decide this case upon this last proposition, because at once upon the close of the plaintiff's case a motion would doubtless be interposed to direct a verdict by reason of the authority of the *Loe* case, *supra*, and therefore we have gone into the whole question, so that the power of the prosecuting attorney in reference to public moneys, property, contracts, and the like, may be construed in the spirit in which the statute was enacted, to-wit, the full and complete protection of the people's property, the people's contracts, the people's moneys, whether that money be a fund created by a dozen contributors for a ditch, a hundred contributors for a road, or ten thousand contributors for a general tax fund.

Judgments of the common pleas and circuit courts reversed, and cause remanded to the court

Syllabus.

of common pleas of Darke county, with instructions to overrule said demurrer, and for further proceedings according to law.

Reversed.

JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

SHAUCK, C. J., concurs in the judgment.

ASSUR, A TAXPAYER, *v.* THE CITY OF CINCINNATI ET AL.

Act of general assembly of April 10, 1913 (103 O. L., 141)—Authorising certain county and municipal authorities—To borrow and expend moneys—For repairing and replacing public property—Damaged and destroyed by the flood of March, 1913—And to issue bonds therefor—Is a valid exercise of legislative power.

The act of the general assembly of Ohio, passed April 10, 1913 (103 O. L., 141), entitled: "An act to authorize county commissioners, township trustees, boards of education, road commissioners, councils of municipal corporations and boards and officers thereof temporarily to repair, reconstruct and replace public property and public ways destroyed or injured by floods occurring in March and April, 1913; to authorize county commissioners and councils of municipal corporations to borrow and expend money for the purpose of cleansing public places and private grounds and buildings and removing therefrom any matter deposited therein by said flood which is inimical to the public health, safety or convenience; and to exempt proceedings for the permanent repair, reconstruction and replacement of such public property and public ways, and bonds issued and levies made for such purposes from certain requirements and limitations," is a valid exercise of legislative power conferred by the constitution on the general assembly of this state.

(No. 14198—Decided June 10, 1913.)

ERROR to the Court of Appeals of Hamilton county.

Statement of the Case.

On the 8th day of May, 1913, plaintiff in error filed his amended petition in the common pleas court of Hamilton county averring among other things that he is a taxpayer of the city of Cincinnati; that he had made demand on the city solicitor of Cincinnati to bring appropriate proceedings to restrain the sale and issue of bonds of that city in the amount of \$125,000, issued in pursuance of the provisions of ordinance No. 201, passed April 15, 1913; that the city solicitor had refused to bring such action, and that the plaintiff brings this action as a taxpayer of the city of Cincinnati and for and in its behalf.

To the petition is attached a copy of the ordinance. That ordinance authorizes the issue of the bonds of said city in the sum of \$125,000 for the purpose of temporarily repairing, reconstructing, and replacing public property and public ways destroyed or injured by floods occurring in March, 1913, in the city of Cincinnati, and purports to be in pursuance of authority conferred upon the councils of municipal corporations of this state by an act of the general assembly of Ohio, passed April 10, 1913 (103 O. L., 141), entitled: "An act to authorize county commissioners, township trustees, boards of education, road commissioners, councils of municipal corporations and boards and officers thereof temporarily to repair, reconstruct and replace public property and public ways destroyed or injured by floods occurring in March and April, 1913; to authorize county commissioners and councils of municipal corporations to borrow and expend money for the purpose of cleansing public places and private grounds and

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buildings and removing therefrom any matter deposited therein by said flood which is inimical to the public health, safety or convenience; and to exempt proceedings for the permanent repair, reconstruction and replacement of such public property and public ways, and bonds issued and levies made for such purposes from certain requirements and limitations."

The amended petition avers that ordinance No. 201 is unconstitutional, invalid and void and prays that the defendant, the city of Cincinnati, and Ira D. Washburn, auditor of said city, be temporarily restrained from the sale and issue of these bonds and that upon final hearing such injunction may be made perpetual.

To this amended petition the defendants filed a general demurrer, which demurrer was sustained by the common pleas court, and the plaintiff not desiring to plead further judgment was entered dismissing the petition at plaintiff's costs.

Error was prosecuted by the plaintiff in the court of appeals for the first judicial district of Ohio and that court affirmed the judgment of the common pleas court, and this proceeding in error is now prosecuted in this court to reverse the judgment of the common pleas court and the judgment of the court of appeals affirming the same.

Messrs. Kohl & Assur, for plaintiff in error.

The act is a law of general nature not operating uniformly throughout the state. *State, ex rel., v. Davis*, 55 Ohio St., 15; *Hixson v. Burson*, 54 Ohio St., 470; *State, ex rel., v. Spellmire*, 67 Ohio St., 77; *Kelley v. State*, 6 Ohio St., 269; *State v. Nel-*

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son, 52 Ohio St., 99; *City of Kenton v. State, ex rel.*, 52 Ohio St., 61; *Gentsch v. State, ex rel.*, 71 Ohio St., 167; *State, ex rel., v. Buckley*, 60 Ohio St., 273; *Cincinnati St. Ry. Co. v. Horstman*, 72 Ohio St., 93.

The act is a special act conferring corporate powers. *State, ex rel., v. Cincinnati*, 20 Ohio St., 18; *State v. Pugh*, 43 Ohio St., 98; *P., Ft. W. & C. Ry. Co. v. Martin*, 53 Ohio St., 386; *Adams v. Nemyer*, 35 W. L. B., 31; *Platt v. Craig*, 66 Ohio St., 75; *Cincinnati v. Trustees of Hospital*, 66 Ohio St., 446.

The act vests legislative powers in the court of common pleas. *City of Zanesville v. Telephone & Telegraph Co.*, 63 Ohio St., 442, 64 Ohio St., 85; *Village of Fairview v. Giffie*, 73 Ohio St., 183.

Mr. Alfred Bettman, city solicitor, for defendants in error.

The following Ohio authorities completely sustain the constitutionality of this act: *Platt v. Craig*, 66 Ohio St., 75; *State v. Nelson*, 52 Ohio St., 88; *Cincinnati St. Ry. Co. v. Horstman*, 72 Ohio St., 93; *Village of Fairview v. Giffie*, 73 Ohio St., 183.

What is a law of a general nature, and when does it have uniform operation throughout the state? 8 Cyc., 1054; *Arms v. Ayer*, 192 Ill., 601; *Warner v. Hoagland*, 51 N. J. L., 66.

Temporariness of time does not render a statute unconstitutional. *Railway Co. v. Horstman, supra.*

The statute in question is not a special act con-

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ferring corporate powers. *Railway Co. v. Horstman*, *supra*, 107.

The statute is not an unconstitutional delegation of legislative power. *Village of Fairview v. Giffee*, *supra*; 8 Cyc., 835.

DONAHUE, J. This ordinance purports to have been adopted under the authority of the act of the general assembly passed April 10, 1913 (103 O. L., 141), as amended 103 O. L., 760, and generally designated as "The Flood Emergency Act." The validity of the ordinance depends upon the constitutionality of this law.

It may be said in passing that if the state has no power to meet this emergency and to relieve the flood-stricken districts from the devastation wrought by this unprecedented calamity, then the state is inherently weak and fails in one of the most important purposes of its organization.

It is perhaps true that when our constitution was written and the various amendments thereto adopted, the people of the state may not have contemplated any such disaster as has overtaken us, and may not therefore have specifically provided the means and methods by which the resulting conditions might be met and mastered.

On the other hand, however, it must be made to appear that this legislation is clearly in violation of the positive provisions of the constitution before a court would declare it unconstitutional. It is true that this court has said many times that in determining the constitutionality of an act the wisdom or beneficent purpose of the legislation under consideration is in no wise important: that the only duty of the court is to determine whether

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the general assembly of the state has acted within its constitutional authority; and undoubtedly that principle must obtain in the determination of the constitutionality of this act. But in view of the terrible catastrophe our state has just suffered and the urgent need for prompt and efficient action, certainly mere technicalities or a refinement of reasoning that might suggest a possible doubt as to the legality of this act ought not to find much favor with the court.

The first contention on the part of plaintiff in error is that this act is invalid because it violates the provisions of Section 26 of Article II of the state constitution.

This provision of the constitution requires that all laws of a general nature shall have uniform operation throughout the state. It has been adjudicated many times by this court that a law that "operates upon every person brought within the relation and circumstances provided for and *in every locality where the condition exists* is a law of uniform operation throughout the state." *State, ex rel., v. Miller*, 87 Ohio St., 12; *City of Cincinnati v. Steinkamp*, 54 Ohio St., 284, 295; *State, ex rel., v. Creamer*, 85 Ohio St., 349; *Miller v. Crawford*, 70 Ohio St., 207; *State, ex rel., v. Spellmire*, 67 Ohio St., 77.

The principal argument urged in behalf of the claim that this law violates this provision of the constitution is that not only can it not have operation now in every locality within the state, but by reason of the fact that it is limited to the repair of damages wrought by the floods in March and April, 1913, it forecloses any possibility of

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other parts of the state where no damage now exists from these floods from ever coming within the provisions of this act.

If this court is correct in its former holdings that a general law that operates in every locality where the conditions exist is a law of uniform operation throughout the state, then this argument must fail, for this law operates in every such locality.

It is also a matter of general knowledge that this flood was not local in its character, but was general throughout this state, as well as in adjoining states, and practically all the portions of this state heretofore subject to floods, as well as many portions of the state that had never before suffered therefrom, were affected by the floods specified in this act. In fact, in all the history of this state there has never except this once been a flood of such a general nature or of such a devastating character both to the lives and property of our people; and applying these historical facts in aid of human judgment which, in view of the sad experiences we have just passed through, is at best lamentably uncertain, it is not a very strong argument to urge that the terms of this statute should have provided that other parts of the state might avail themselves of its provisions when other floods affected them in like manner.

It amounts to saying in fact that no valid legislation can be passed for relief of flood disasters in the valleys and lowlands of the state because forsooth the hills and highlands have not suffered; for it was practically only the hills and highlands

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of the state that were exempt from the devastation of this flood.

But this act is in its very nature an emergency act. It deals with conditions that now confront us, and with conditions that we hope and have reason to hope may never be known again in this state. It is not the ordinary, everyday experience or condition, but an extraordinary situation requiring extraordinary remedies and remedies that cannot well be delayed for a change in our organic law.

These conditions are necessarily temporary in character, and the legislature is to be congratulated upon its optimistic view deducible from the provisions of this act that this experience will not be repeated. The legislature has therefore dealt with it as a thing apart from the ordinary routine of public affairs. The fact that it applies to present conditions only, does not affect its uniform operation throughout the state. It might just as well be said that a law authorizing the pensioning of soldiers in the War of the Rebellion is not of uniform operation, because that war is over and only soldiers who participated in that war could receive such pension; and because no other persons except the soldiers engaged in that war could ever by any means or methods come within the operation of that law. But that law does not prevent the passage of an act to pension soldiers of another war when the necessity occurs, nor does this law prevent the passage of an act of the general assembly to take care of conditions arising from future floods, if that unhappy necessity should ever present itself for its consideration.

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Our attention is called, however, to the fact that this law purports to confer on courts of common pleas in the affected counties a jurisdiction not conferred on these courts in other localities, and for that reason it is not of uniform operation throughout the state.

What has been said in reference to the uniform operation of this law in every locality where the condition specified in the act exists also applies to this contention. This act confers jurisdiction on the common pleas courts, or any judge of the common pleas courts of this state the same authority, to act when the matter is presented in the manner and form provided for in the act itself.

It does fix the venue in which the application shall be made. But every common pleas court in the state is granted the same authority and the same jurisdiction, the only requirement being as to venue. The fact that there may be some counties in the state where such an application may never be filed is in no wise important. The fact that it may be filed in such court when the venue is properly laid is sufficient to show that it has uniform operation throughout the state. The legislature has fixed the venue for all other kinds and character of actions, and while the legislature has necessarily conferred like jurisdiction on all common pleas courts it has very properly limited its jurisdiction to the venue fixed for the bringing of such action. For example, all common pleas courts have jurisdiction in actions for money only, and yet the legislature has limited the venue of such an action to the county in which the defend-

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ant or one of the defendants may be served with summons.

It is said, however, that this act vests legislative powers in the courts of common pleas. The language of the act is not subject to such construction. It provides that the common pleas court or a judge thereof shall hear and determine if such public necessity exists, if such proposed repair, construction or replacement is temporary in its nature and should be made forthwith, and if the amount of money proposed to be expended therefor is reasonable and justified by such necessity. These questions so submitted to the court are not legislative but justiciable questions in every sense of the word. This provision is written into this law for the evident purpose of safeguarding public moneys and public credit and is in lieu of the general laws provided for such purpose in the transaction of ordinary public business.

It is claimed that the fact that these laws are suspended by the act in question is another reason why the act is not of uniform operation throughout the state, because of the fact that in all other localities except flood districts the general laws apply to all the matters and things contemplated to be done under this act, and that this exemption can apply only in the counties affected.

This is not a valid objection to the law, because a law is of uniform operation if it applies in every locality of the state where the condition named in the law exists.

It is also claimed that this is a special act conferring special powers on particular municipalities and on the courts of common pleas in the counties

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in which they are located, and to meet local conditions only. The reasons already given why this law is of uniform operation throughout the state apply with equal force to this contention. It cannot be doubted that the general laws may apply to certain localities only, if such laws apply to all persons who are similarly situated in such localities and to all parts of the state where like conditions exist. Laws are not held to be general and uniform because they operate upon every person in a state. If that were true, very little legislation would be constitutional; for laws do not as a rule operate upon every person in the state; but rather upon every person who is within the relation and circumstances provided for in the law; and that being true, the number of persons or the extent of territory affected is in no wise important, either in determining the uniform operation of the act or the general nature of the law. An act is not a special act merely because every individual in the state and every part of the territory within the limits of the state do not come within its operation. It is a general law if it applies to all persons similarly situated and to all localities where like conditions exist.

For these reasons, we have reached the conclusion that the act in question is constitutional and that the ordinance passed under authority of this act is a valid ordinance of the city of Cincinnati.

Judgment affirmed.

SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Statement of the Case.

SPENGLER v. SONNENBERG ET AL.

Proceedings to enforce specific performance—Written contract for sale of real estate—Signed by agent under express authority—Authority must conform to identical contract sued on—Parol authority of agent must be clearly proven—Law of agency.

1. In a proceeding to enforce specific performance of a written contract for the sale of real estate, signed by an agent under express authority, it must be shown that the authority was such as to permit the making of the identical contract sued on, and not one differing therefrom in a material respect.
2. If an agent, acting under express authority to enter into a written contract for the sale of land, makes a contract for his principal which includes terms not authorized, the agreement is void, and its performance will not be enforced.
3. Where the express authority of an agent to sign an agreement in writing for the sale of lands rests in parol, the proof must be clear and convincing not only of such parol authority, but also that the authority was such as to permit the inclusion of all of the material terms which are embodied in the instrument.

(No. 13327—Decided June 10, 1913.)

ERROR to the Circuit Court of Henry county.

This was a proceeding for the specific performance of a written contract for the sale of eighty acres of land in Henry county and certain personal property and rights.

The petition alleged that Spengler, the defendant below, was the owner of the land and that on the 26th day of February, 1910, he entered into an agreement in writing, signed by his duly authorized agents, Hanna & Konzen, whereby he agreed to and did sell the said premises for the sum of \$10,800.00, payable \$3,000.00 on or before March 20, 1910, \$2,000.00 on or before June 1, 1910, deferred payment to be secured by three equal

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notes due in one, two and three years from date respectively, with six per cent. interest payable annually, with privilege of payment in sums of \$100.00 or more on any interest day. Said notes to be secured by mortgage on said premises. The plaintiffs to have the tile, logs, lumber and wire fencing then on said premises for the improvement of the same; also to have the farm's share, as given by the renter thereof, for the season 1910.

The petition further alleges that the plaintiffs tendered to the defendant the sums of money stated and the notes secured by the mortgage, in accordance with the agreement, but that the defendant refused and still refuses to receive said payments and notes and refuses to execute and deliver to plaintiffs a good and sufficient deed or any deed for said premises.

The answer of the defendant admits that he is the owner of the lands and in possession of the same and has been in possession for many years last passed and denies all the other allegations in the petition.

On the hearing in the common pleas, a finding and decree was entered in favor of the plaintiffs. The case was appealed to the circuit court where it was ordered and decreed that the plaintiffs, within five days, deposit with the clerk of the court the \$5,000.00 in money and the three notes and the mortgage securing the payment of the same, and that defendant shall "within five days thereafter, execute and deliver to plaintiffs a warranty deed for the premises described in said petition, and that upon failure of defendant to execute and deliver to plaintiffs such a deed, this

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decree shall stand for and operate as such conveyance."

It was further ordered that in the event plaintiff failed to deposit said money, notes and mortgage within the time specified, plaintiffs' petition shall stand dismissed.

A finding of facts was made by the circuit court on which its judgment was entered. From this it appears that in May, 1909, William Spengler owned the lands described in the petition; that in said month he verbally authorized Hanna & Konzen, who were real estate brokers at Napoleon in said county, to sell said land at not less than \$130.00 an acre, upon a fair contract, to a purchaser who was a responsible man, for a reasonable payment at the time of the consummation and execution of the deed, and the balance on any reasonable terms to suit the purchaser. Deferred payments were to bear six per cent. interest, payable annually, secured by mortgage. That the defendant authorized Hanna & Konzen when and as soon as they found such purchaser, who would buy the lands on the terms stated, to enter into a written contract with such purchaser on behalf of the defendant.

The finding further shows that at the time defendant authorized the real estate agents to sell the land, nothing was said between the defendant and the agents concerning the kind of deed to be made, that nothing was said relative to an abstract of title nor about the crops, the rents, the time when possession should be given, payment of taxes or about all, or any, of the items of personal property, mentioned in the contract thereafter

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made by the agents with the plaintiffs, or about any personal property whatsoever.

It is further shown that some nine months later, on the 26th of February, 1910, the agents entered into a written contract with the plaintiffs below, who were responsible men, and signed the defendant Spengler's name to the contract and delivered it to the plaintiffs. The written contract was included in the finding of facts and purports to be a sale by Spengler to plaintiffs of the land described for \$10,800.00, payable in the manner stated in the petition, the owner to execute and deliver a warranty deed and abstract of title by June 1, 1910, and included the provision: "It is understood and agreed that second party is to have the tile that is on the farm at this time; also all logs, lumber and wire fencing, etc., that are on the farm to be used for the improvement of said farm. It is also understood and agreed that second party is to have the farm's share of the rent as agreed by said first party with the renter on the farm for season 1910. Second party to have the right to enter on said farm to make improvements so long as they do not interfere with growing crops of the renter on said farm."

The finding further shows that at the date of the contract there was on the farm, belonging to the defendant, fencing, drainage tile, farm lumber and logs, which had been procured by him but which had not been used on said farm; that at that time the farm had been rented by the defendant until March 1, 1911, to the tenant who was in possession.

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The finding also shows that immediately after the execution of the contract the agents notified the defendant of what they had done, and asked him to be ready to carry out the contract, but that he refused to do so and that in a few days thereafter he notified the plaintiffs that he would not carry out the terms or provisions of the contract of February 26th, and that thereafter the plaintiffs tendered to the agents and to the defendant the money and notes provided for by the contract to be paid and delivered by them. The finding further shows that at the time of the trial in the common pleas and in the circuit courts, the plaintiffs tendered to the defendant \$5,000 in cash and the notes and mortgage above referred to and demanded that defendant execute and deliver to them a deed for said lands as provided in said contract and demanded full performance of said contract by him, but that said defendant refused to make said deed or performance of contract.

This proceeding is brought to reverse the judgment of the circuit court and for judgment.

Messrs. Harris & Shaw, for plaintiff in error.

The cases involving unauthorized sale by agents of fencing, lumber, logs, tile, abstract and warranty, in addition to the sale of land, are not numerous. There are, however, a number of cases wherein analogous questions relating to commissions, taxes, interest, time in which to make sale, and the terms of payment for land bargained by agents have arisen when specific performance was sought. We believe that all such cases that have

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been reported, sustain the views we urge. Among them are: *Dayton v. Buford*, 18 Minn., 126; *Siebold v. Davie*, 67 Ia., 560, 25 N. W. Rep., 778; *Monson v. Kill*, 144 Ill., 248, 33 N. E. Rep., 43; *Munson v. Jacques*, 144 Ill., 651, 33 N. E. Rep., 757; *Jackson v. Badger*, 25 Minn., 52, 26 N. W. Rep., 908; *Miller v. Sawbridge*, 29 Minn., 442, 13 N. W. Rep., 671; *Hamlin v. Wistar*, 31 Minn., 418, 18 N. W. Rep., 145; *Oliver v. Sattler*, 233 Ill., 536, 84 N. E. Rep., 652; *Hoyt v. Shipherd*, 70 Ill., 309; *Kinman v. Botts*, 147 Ia., 474, 124 N. W. Rep., 773; *Hartenbower v. Uden*, 242 Ill., 434, 90 N. E. Rep., 298, 28 L. R. A., N. S., 738; *Tripp v. Smith*, 180 Mass., 122; *DeSollar v. Hanscome*, 158 U. S., 216; *Brown v. Grady*, 16 Wyo., 151, 92 Pac. Rep., 622; *Downing Investment Co. v. Coolidge*, 46 Colo., 345, 104 Pac. Rep., 392; *Morris v. Ruddy*, 20 N. J. Eq., 236; *Speer v. Craig*, 16 Colo., 478, 27 Pac. Rep., 891; *Hampton v. Moorehead*, 62 Ia., 91, 17 N. W. Rep., 202; *Wilkin v. Voss*, 120 Ia., 500, 94 N. W. Rep., 1123.

Messrs. Donovan & Dittmer and Mr. W. W. Campbell, for defendants in error.

It is a general rule that when a power is conferred upon an agent, he has by implication such incidental authority as is necessary to carry his power into effect. *Insurance Co. v. Williams*, 39 Ohio St., 588; *Pollock v. Cohen*, 32 Ohio St., 514; 31 Cyc., 1335, 1364.

The proper authority includes all mediate powers which are necessary to carry it into effect, and this applies equally to general and to special agencies. 31 Cyc., 1344; *Bell v. Moss*, 5 Whart., 189;

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Peck v. Harriott, 6 Serg. & R., 146, 9 Am. Dec., 415.

The implied powers and authority of an agent employed for a particular service depend largely upon the circumstances in each case and upon what is necessary or reasonable to enable him to effect the purpose of his agency. *N. Y., etc., Mining Co. v. Fraser*, 130 U. S., 611; *National Bank of Republic v. Old Town Bank*, 112 Fed. Rep., 726, 50 C. C. A., 433; 31 Cyc., 1366; *General Cartage & Storage Co. v. Cox*, 74 Ohio St., 294.

JOHNSON, J. From the finding of facts, it appears that the defendant in May, 1909, verbally authorized the real estate agents to sell the land referred to, for the price and on the conditions named, and also authorized them to enter into a written contract with the purchaser when found.

The finding shows that, in the employment of the agents by the defendant, nothing was said as to the kind of deed to be made; nothing as to an abstract of title, nor as to the crops, rents, time when possession was to be given, payment of taxes, nor about any personal property whatever.

Notwithstanding this, all of these matters were covered by the contract which the agents made, and plaintiff in error contends that, as he did not authorize the making of such a contract, he was warranted in refusing to carry it out, and that the circuit court erred in finding that the plaintiffs below were "entitled to have the agreement performed as to the real estate."

The contract which the defendant repudiated was the one embodied in the written instrument

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signed by the agents, the one on which suit was brought and the one which, as shown by the finding, plaintiffs demanded full performance of by the defendant, on the trial in both of the courts below.

It is the settled law of this state that a real estate agent is without authority to execute a contract of sale which shall be binding on one who places real estate in his hands for sale, unless such authority is specially conferred. *Weatherhead v. Ettinger*, 78 Ohio St., 104.

The business of a real estate agent is to find prospective purchasers for property whose owners desire to sell, and if employed he has earned his commission when he has found a person willing and able to pay the price stipulated, or has brought parties together who afterwards agree. The fact that the owner of real estate employs an agent to find a purchaser for it, does not raise an implication that the agent is authorized to make a written contract with reference to it. And while the weight of authority seems to sustain the proposition that special authority to an agent to enter into a written contract may be verbally conferred, the proof must be clear and decisive, not only of such parol agreement, but that the agent had authority to make all of the terms for his principal which he includes in the written contract. If the agent assumes to make a contract in excess of this authority, the agreement is void and unenforceable. Where special power is conferred upon an agent, persons dealing with him are bound to ascertain the extent of his power. *Pomeroy Spec. Perf.*, Sec. 77; *Morris v. Ruddy*, 20 N. J. Eq., 238;

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Merritt v. Wassenich, 49 Fed. Rep., 785; *Campbell v. Hough*, 73 N. J. Eq., 601; *Payne v. Potter*, 9 Iowa, 549; 31 Cyc., 1350; *Ward v. Thrustin*, 40 Ohio St., 347.

It would seem that the justice and salutary force of these rules would be obvious. The owner of land is not bound to perform any contract for its sale unless it is in writing. A prospective purchaser is presumed to know that such is the law. When he deals with the person who claims to have verbal authority to sign such a contract as the agent of the owner, he does so with the knowledge that the principal will not be bound unless he had specially authorized the agent to make the contract which he assumes to make. The statute of frauds itself is but the expression of a wholesome desire to avoid some results of the infirmities of human nature.

Our attention is called to some cases in which the rule is announced that when a power is conferred upon an agent he has by implication such incidental authority as is necessary to carry his power into effect and defendants in error contend that inasmuch as the only direction which Spengler gave to the agents in this case was that the price should not be less than \$130.00 an acre, all other matters necessary to be determined in the making and execution of the contract were left open without any specific instructions or limitations.

There is no doubt as to the correctness of the rule stated, but the incidental authority which the agent has by implication is only such as is necessary to carry into effect the power actually con-

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ferred on him. It cannot be said that where an agent was employed to sell a piece of land for \$130.00 an acre, he had incidental authority to convey other valuable property and rights, in addition to the land, for the same price, and yet that is what the written contract made by the agents in this case provided for. The tile, the fencing material, the lumber and the logs, all were personal property belonging to Mr. Spengler, separate and apart from the realty. The contract also provided that the purchaser should have the landlord's share of the rents for the year 1910, and, at the same time, provided that the making of the deed should be postponed till June 1, 1910, at which time the cash payments should be completed.

The contract was made February 26th, the taxes became a lien in April, the deed and complete cash payment were postponed until June. By the arrangement stated, the purchaser would secure the rent for the year 1910 and Spengler would be compelled to pay a year's taxes which became a lien more than a month after the making of the contract. Moreover, under that provision of the contract, Spengler, in addition to giving up the rent and assuming taxes which became a lien after he made the contract, would lose the interest for the time between February 26th and June 1st on \$7,800.00 of the purchase price.

None of these things was included in the authority given to the agents, and none of these things can, under any just rule, be held to be necessarily incidental to the power given by the

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verbal agreement. The effect of such provisions was to reduce the price to be paid for the land itself, below the sum for which the owner had authorized it to be sold.

The written contract made by the agents also provided that the vendor should furnish to the purchaser an abstract of title to the premises and should convey them by warranty deed.

Authority to contract for an abstract of title would not be implied, because the vendor is under no obligation, in the absence of express provisions, to furnish the vendee with an abstract of title. *Thomas v. Guaranty Title & Trust Co.*, 81 Ohio St., 432. The same remark may be made as to the provision for a warranty deed.

The learned circuit court seems to have been of the opinion that the written contract, in so far as it provided for the conveyance of the personal property and rights referred to, was not binding on the defendant Spengler, but they found that "as to said real estate plaintiffs were entitled to have said agreement enforced."

The contract was entire. The price named was one entire sum for all of the property contracted for, not apportioned in any manner. The decree entered by the circuit court in effect subjected the vendor to the payment of the taxes referred to, as well as the loss of the interest on the sum above stated. All of this was as much unauthorized as the provisions for the conveyance of the personal property and the making of the abstract. The whole arrangement lacked the essential element of mutuality.

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Courts will compel parties to perform contracts in accordance with their terms, but they have no power to and will not make contracts for persons and compel the execution of them. Where the contract is entire and the consideration indivisible, if any material part of it is unauthorized, none can be enforced. Specific performance of contracts is a matter resting in the sound discretion of the court, not arbitrary, but controlled by principles of equity, on full consideration of the circumstances of each particular case.

In *City of Wellston v. Morgan*, 59 Ohio St., 147, the statute under which the contract was made provided that it could be made for any period not exceeding ten years. A contract was made by the city for ninety-nine years. Its validity being attacked, it was contended that it was good for the ten years authorized by law, but the court held that the contract was entire and unseverable. It was held that the court could not make a different contract for the parties than the one they had made, by enforcing it for part of the time.

Spear, C. J., in the opinion, declares: "We are dealing with the subject of contract. It implies parties and a meeting of the minds. The paper presented undertakes to stipulate for the furnishing of light and an agreed price therefor, for a period of ninety-nine years. The proposition is that we now treat it as a contract for ten years; that is, that the court shall make a new contract for the parties for ten years, and then enforce it. How can we say that the company would have incurred the great expense and outlay of money

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and labor, which the petition declares was incurred, for the period of ten years only? And if the court were of the opinion that probably the company would have been willing to so contract, where is there any authority in the court to now alter the terms that they did agree upon and then enforce them as changed? We are of the opinion that neither in law nor reason is there any ground for such a proposition."

In *Morris v. Ruddy*, 20 N. J. Eq., 236, it is held that a broker employed to sell lands has no implied authority to sign a contract of sale on behalf of his principal, but that, if he had authority and the contract varies from his instructions, the principal will not be bound by it.

It was contended that the contract made by the agent varied from his authority in that by the contract the owner who employed the broker was left to pay the commissions, while the authority was to sell for \$3,000 net, free of charge for commissions. The owner testified that these were the instructions, and the broker, who was the only other witness, admitted that he was so instructed by the defendant. The court says: "He says that the complainant, by a verbal agreement, was to pay the commission and the complainant offers to pay them. But the written bargain is for \$3,000, not for that and commissions. If the defendant is bound by the bargain as written, he can no more claim commissions than he could claim \$3,030 on a parol understanding. If authority should be given in writing to contract to sell lands for \$1,000, retaining the right to occupy for three months, a written contract to sell for \$1,000 would

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not be valid, although there was a verbal understanding which the purchaser will comply with, permitting the occupation. The defendant is bound by this written contract to a different bargain from the one he authorized." The court refused to enter a decree.

In *Campbell v. Hough*, 73 N. J. Eq., 601, there was a sale made by an agent who claimed to have been verbally authorized to sign a written agreement for the owner. The court, in the opinion, points out that the agreement as claimed by the agent, did not give him authority to bind the owner to pay the taxes due after sale, and say: "The authority, however, must be such as to permit the making of the identical contract sued on and not a contract different from the one actually authorized."

The case we have in hand differs from those in which equity will enforce specific performance as to part of the property contracted for, when it appears that the vendor does not own all of the interests he has agreed to sell, and is, therefore, unable to convey them in full in accordance with his contract.

In such case, the vendor is estopped from asserting his inability to perform, and the purchaser is permitted to insist that the vendor shall perform *pro tanto*. Here the purchaser was bound to know the extent of the agent's authority. The contract made by the agent exceeded that authority, and the principal repudiated it as soon as he learned that it had been made. The case contains none of the elements which must be present before the application of the doctrine of estoppel can be

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insisted upon. There was no conduct or representation by the owner upon which the purchaser relied. Nothing whatever was done by the purchaser which was induced by the silence of the owner with knowledge of the facts. / On the contrary, the purchaser being charged with knowledge of the extent of the agent's authority is presumed to have known that many items which were included in the contract were not authorized, and that, therefore, the contract itself, in its entirety, was subject to the approval of the owner when brought to his knowledge and that he would not be bound by it unless and until he had approved it. There is a clear distinction between an entire indivisible contract, which was only authorized in part, and a contract made by an owner or by his duly authorized agent, which he is only able to perform in part. The vendee may waive performance of the part which the vendor is unable to perform and insist on the rest, but as to a contract which was unauthorized, a decree of specific performance, in whole or in part, would be to enforce a contract which the owner never made.

For these reasons, the judgment of the court below will be reversed and judgment entered for plaintiff in error.

Judgment reversed.

SHAUCK, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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HAMANN, SHERIFF, v. HEEKIN.

Contributing members of military organisations—Section 5210, General Code—Provision of Section 5211, exempting same from jury service, void—Constitutional law.

Because of the unequal terms upon which Section 5210, General Code, authorizes persons to become contributing members of the military organizations of the state the provision of Section 5211 to exempt such members from service as jurors is void.

(No. 13291—Decided June 10, 1913.)

ERROR to the Circuit Court of Hamilton county.

By the judgment under review the circuit court affirmed a judgment of the court of insolvency by which Heekin was released from the custody of the sheriff on a petition in habeas corpus. His petition was submitted on an agreed statement of facts:

“The parties hereto represent that a dispute exists between them respecting the authority of the common pleas court to restrain one James J. Heekin of his liberty for an alleged contempt of said court by the refusal of the said James J. Heekin to serve as a petit juror in said court; and do mutually agree upon the following statement of facts relating to said controversy:

“It is mutually agreed that on or about the 18th day of October, 1909, James J. Heekin was enrolled as contributing member of Company ‘I,’ First Infantry Ohio National Guard, which company is stationed in the city of Cincinnati, county of Hamilton and state of Ohio. At the same time there was issued to him a written instrument cer-

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tifying as to his membership. The said James J. Heekin was enrolled a contributing member as aforesaid upon his paying the sum of ten (\$10) dollars to the treasurer of said company and no other act, or agreement, was done, or promised by said James J. Heekin or obligation required of him in connection with said enrollment, and no services, duties or obligations were, or are, imposed upon him as such contributing member, either by the rules and regulations of said Ohio National Guard, or by the council of administration or officers of said Company 'I.'

"It is further mutually agreed that on or about the 23rd day of March, 1910, the said James J. Heekin was duly summoned to appear before the Honorable John G. O'Connell, judge of the common pleas court of Hamilton county, Ohio, to serve as a petit juror, having been theretofore selected and his name certified by the jury commissioners of Hamilton county, Ohio, and his name drawn from the jury wheel as provided by laws thereunto pertaining. On or about the fourth day of April, 1910, and in compliance with said summons, he appeared before said judge and, presenting his certificate as a contributing member of said company and claiming to be exempt from jury service by virtue of the provisions of Section 3055, Revised Statutes of Ohio, refused to serve as a petit juror. Whereupon the said court declared said James J. Heekin to be in contempt and remanded him to the custody of the sheriff of Hamilton county, Ohio.

"It is further mutually agreed that the said James J. Heekin was immediately taken into the

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custody of said sheriff; that on or about the 5th day of April, 1910, the said James J. Heekin filed an application for a writ of habeas corpus in the insolvency court of Hamilton county, Ohio, and that on or about the 13th day of April, 1910, a writ was issued by the Honorable Almon M. Warner, judge of said insolvency court, to Oliver P. Coe, coroner of Hamilton county, Ohio, which writ was duly returned on or about the 22d day of April, 1910.

"And this was all the evidence and all the facts stated in the trial of this cause."

Mr. Thomas L. Pogue, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Charles A. Groom*, assistant prosecuting attorneys, for plaintiff in error.

The act grants special privileges and immunities, and is unequal in its operation. *State v. Coulter*, Wright, 424; *State v. Gardner*, 58 Ohio St., 610; *Driggs v. State*, 52 Ohio St., 51; *Platt v. Craig et al.*, 66 Ohio St., 80; *Gentsch v. State*, 71 Ohio St., 164; *State, ex rel., v. Spellmire*, 67 Ohio St., 86.

The act does not operate uniformly on the class of contributing members. Such members in one part of the state may be subject to larger or smaller dues and contributions and radically different services from those in another part of the state.

An enlistment is not merely a contract, but is the creation of a *status*. *In re Grimley*, 137 U. S., 151; *In re Morrissey*, 137 U. S., 159; *In re Disinger*, 12 Ohio St., 258.

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Contributing members enter into a *status*, and the duties cannot be left to the designation of local individuals or boards without destroying the uniformity of operation required by Section 26, Article II, Constitution. *State v. Gardner, supra*.

The act is unconstitutional as a delegation of legislative power. It gives to the council of administration the power to determine and make the law applicable to and enforceable upon persons within that *status*. *C. W. & Z. Rd. Co. v. Commissioners*, 1 Ohio St., 87.

Mr. Walter W. Schwaab, for defendant in error.

The act has uniform operation throughout the state and does not grant special privileges and immunities. *Jarvis v. State*, 138 Ala., 17; *Hall v. Burlingame*, 88 Mich., 438.

It is for the legislature to determine of what number the active militia shall consist, and it may fix any number that it may see fit. *Dunne v. People*, 94 Ill., 136; *Bragg v. People*, 78 Ill., 330; *State v. Cohn*, 9 Nev., 179; *McGunnegle v. State*, 6 Mo., 367.

The act has uniform operation throughout the entire active militia, including contributing members.

An enlistment does not create a *status* and is merely a contract, and when certain duties are required of a contributing member by the council of administration, they are merely contracting with each other, which is valid and binding. *In re Disinger*, 12 Ohio St., 256; *Commonwealth v.*

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Fox, 7 Pa. St., 339; *In re Carlton*, 7 Cow. (N. Y.), 471.

An enlistment is only a contract, and when entered into by a minor is voidable. *United States v. Hanchett*, 18 Fed. Rep., 26; *In re Baker*, 23 Fed. Rep., 30; *In re Davison*, 21 Fed. Rep., 618; *In re McNulty*, 2 Low. (U. S.), 270; *In re Wall*, 8 Fed. Rep., 85.

No legislative power is delegated. *Stoutenburgh v. Hennick*, 129 U. S., 147.

SHAUCK, C. J. Counsel agree respecting the soundness and pertinence of the proposition, so often decided by this court in the cases cited in the briefs and in many others, that our constitution ordains absolute equality of right and opportunity and that all laws must, to be valid, operate equally upon all persons of the same class. The point of difference between counsel, and between the common pleas court by which Heekin was committed as for contempt and the insolvency court which ordered his release, is whether that admitted rule of equality is violated by the provisions of the statute under whose favor Heekin claimed immunity from service as a juror. Those provisions are found in Sections 5210 and 5211, General Code. The former section provides that commanding officers of companies, etc., may in time of peace enlist contributing members not to exceed one hundred and fifty and that "such members shall be subject to such contributions, dues and services as may be ordered by the council of administration of the respective organizations; but the dues of such members shall not be less than

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five dollars each per annum." The latter section provides that the commanding officer shall file with the clerk of the court of the county in which such company is located, a certified list of the officers and enlisted men, and provides that the enlisted men and contributing members for the ensuing year or until discharged shall be exempt from labor on the public highways and service as jurors.

Counsel for the defendant in error cites reported cases in other states which are said to fully justify the conclusion that this statute is a valid enactment and consequently that it authorized Heekin's claimed immunity from obligation to serve as a juror and rendered void the order of his commitment as for a contempt. But, if we assume the complete identity of the constitutional provisions involved, differences in the provisions of the statutes will plainly distinguish this from most of the cases cited. Active members of the guard or militia are subject to the orders of their officers and they are enlisted for the same service, and statutes providing for their exemption from duty as jurors in consideration of such service obviously operate equally upon all who are affected by them, since the immunity is in all cases upon the same conditions.

But Heekin was not an active member of any military organization. His immunity from service as a juror was claimed on the ground alone that he was enrolled as a contributing member of Company I, First Infantry, such enrollment being upon the payment of ten dollars and without the performance of any other duty or the payment or the

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promise to pay any other sum. The sum so paid by Heekin for the claimed immunity from service as a juror was not fixed by any provision of the statute operating alike upon other contributing members, the terms of the statute fixing only the minimum limit of five dollars. The terms of the statute make it entirely clear that the attempt of the legislature to afford the immunity contemplated was not upon equal conditions either as to military service or as to the amount of money to be contributed. It is true that in one of the cases cited by counsel for the defendant in error, *Hall v. Burlingame*, 88 Mich., 438, it was held that immunity from service as a juror was effectively conferred upon a contributing member of a military organization. It is not entirely clear from the report that all of the constitutional and statutory provisions were identical with those which are presented here. But it is clear that the reasoning of the court in that case would not justify an affirmance of the judgment which we are considering. That conclusion seems to have been placed upon the propositions that it is the duty of the legislature to provide for the organization of the military power of the state, to establish the qualifications of jurors, and to provide who may be exempt. All of these propositions are permissible in this state, but the organization of the militia contemplated by the express provisions of our constitution requires that the duty whether of service or of commutation shall rest equally upon all citizens of the same class. This case does not in any respect involve the qualifications of a juror but only the immunity from jury service of

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one whose qualifications are admitted. While the power of the general assembly to determine who may be exempt from such service is not doubted, the exemption must be by laws of equal operation as to the conditions of exemption. The very terms of the statute in question show that no such equality of conditions is prescribed.

It is not at all material in the present inquiry that the statute under which the defendant claims immunity has been acquiesced in for many years. As said by Judge Cooley, Const. Limitations, 85, 86: "Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will and the constitution has appointed judicial tribunals to enforce it."

The judgment will be reversed and the petitioner remanded to the custody of the sheriff.

Reversed.

JOHNSON, DONAHUE, WANAMAKER, NEWMAN
and WILKIN, JJ., concur.

CROW v. SIMS.

In action for malicious prosecution of attachment case—Malice and want of probable cause—Must be alleged and proven—Action for damages maintainable on statutory bond, when—Section 10254, General Code, requiring bond—Does not affect common law right of action, when.

1. A suit for damages for causing an attachment to issue as auxiliary to a civil action for debt is no exception to the general rule that in all actions at common law for malicious prosecution or for the abuse of the processes of the court, malice and want of probable cause must be alleged and proven.

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2. In such case, in the absence of malice and want of probable cause, no action can be maintained except upon the statutory bond, if any, given in the attachment proceeding.
3. The provision of Section 10254, General Code, requiring the plaintiff to furnish a bond before a writ of attachment shall issue, conditioned that the plaintiff will pay defendant the damages he may sustain if the order therefor is wrongfully obtained, has no application to and does not affect the common law right of action, but merely furnishes an additional statutory protection to the defendant.

(No. 13169—Decided June 10, 1913.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Howland, Moffett & Niman, for plaintiff in error.

Messrs. Hidy, Klein & Harris, for defendant in error.

BY THE COURT. The petition in this case avers that the plaintiff in error wrongfully caused an attachment against plaintiff's wages to be issued out of a justice's court on a claim for house rent. It does not aver that any bond in attachment was given or that it was a case in which a bond was required to be given before a writ of attachment could issue. There is no averment that the writ of attachment was actually levied on any property belonging to the plaintiff or that any garnishee process was issued or served in said case; nor is there any averment of malice and want of probable cause.

This petition does not state a cause of action either at common law or on the statutory bond.

The common pleas court erred in overruling the objection of plaintiff in error to the introduction

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of any evidence, and the circuit court erred in affirming the judgment of the common pleas court.

Judgment reversed and judgment for plaintiff in error.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

THE ASSETS REALIZATION COMPANY *v.* AMERICAN
BONDING COMPANY OF BALTIMORE ET AL.

Co-suretyship does not exist—Where sureties are bound to same principal on separate instruments—Each bond limiting liability proportionately to total loss by obligee—Collateral given to indemnify one surety—Does not inure to benefit of all, when—Distribution of assets among respective sureties—Law of suretyship and assignment.

1. Where several surety companies are bound by separate instruments on account of the same principal, and each company, by its bond, limits its liability, in the event of default on the part of the principal, to such proportion of the total loss sustained by the obligee as the penalty named in its bond bears to the total amount of the bonds furnished by the principal to the obligee, the suretyship of each company is a separate and distinct transaction and the relation of co-suretyship among them does not arise, nor does the right of contribution exist.
2. Where, in such case, collateral or securities are placed by the principal in the hands of one of the companies to indemnify it against any loss it might incur by reason of its obligation on its bond, none of the other companies, in the event of the default of the principal, is entitled to any part of such collateral or securities to indemnify it against a loss incurred on account of its bond.
3. The principal, indebted at the time to the obligee on the obligation for which the bonds were required, made an assignment for the benefit of its creditors, and the claim of the obligee against the principal was allowed by the assignee; the several

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surety companies paid to the obligee the amount of this claim, each company paying the proportionate part of the indebtedness as provided in its bond, and each company taking an assignment from the obligee of its proper fractional share of the claim of the obligee against the principal and its assignee; subsequently a company, other than the surety companies, purchased all the assets, except cash, of the assignor in the hands of the assignee, and agreed to pay the latter an amount which, with the cash in its hands, would enable it, the assignee, to pay a dividend of fifty per cent. on the face amount of all claims of creditors allowed, which agreement, on the part of the purchaser, was approved by the court of insolvency; prior to the assignment of the principal, it had placed in the hands of two of the surety companies separate collateral or securities to indemnify them.

Held: That the purchaser of the assets of the principal must pay an amount sufficient for a dividend of fifty per cent. on the face amount of the claim of the obligee against the principal, as allowed, without any reduction on account of the collateral held by the two secured companies, and that the purchaser of the assets, under its contract of purchase, is entitled to any excess or surplus of collateral remaining after the two secured companies are indemnified thereby.

(No. 13012—Decided June 17, 1913.)

ERROR to the Circuit Court of Cuyahoga county.

The American Bonding Company of Baltimore, The United States Fidelity & Guaranty Company and the Fidelity & Casualty Company brought suit in the common pleas court of Cuyahoga county against The Fidelity & Deposit Company of Maryland, the National Surety Company, the Aetna Indemnity Company, The Metropolitan Surety Company, the United Surety Company, the city of Cleveland, The Euclid Avenue Trust Company, The Cleveland Trust Company and The Assets Realization Company. Plaintiffs, in their petition, asked, among other things, judgment against The Cleveland Trust Company, the assignee of The Euclid Avenue Trust Company, for full dividends

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upon the proportions of the face value of a certain claim of the city of Cleveland against The Euclid Avenue Trust Company, which proportions were assigned to plaintiffs, and further asked that certain securities or notes and mortgages held by the National Surety Company and The Fidelity & Deposit Company of Maryland be ordered converted into money in such manner as the court might direct, and, after paying costs and expenses, the same be apportioned among the various bonding or surety companies, plaintiffs and defendants in said action.

All the defendants, except the city of Cleveland and The Euclid Avenue Trust Company, filed answers and cross-petitions and the cause was submitted to the common pleas court upon the petition of plaintiffs, the various answers and cross-petitions, the replies and the evidence, and the common pleas court rendered judgment practically in accord with the prayer of the plaintiffs and of the cross-petition of the bonding companies other than The Fidelity & Deposit Company of Maryland and the National Surety Company.

An appeal to the circuit court was taken from the judgment of the common pleas court by the two companies last named, and the circuit court granted the entire relief sought by plaintiffs and stated its conclusions of law and its conclusions of fact.

To understand clearly the relations of the parties, the questions involved and the matters in controversy, it is necessary to recite, at length, the facts found by the circuit court.

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This litigation grew out of the failure of The Euclid Avenue Trust Company, a banking institution of the city of Cleveland, which was a depository of certain funds of that city. It was appointed and designated a depository of a part of the public money of the city for a term of three years, beginning July 1, 1907, and ending June 30, 1910, the amount of money on deposit to be at no time in excess of the sum of \$250,000. This appointment was made under the authority of an ordinance of the city creating a Depositary Commission.

Among the provisions of this ordinance was one which required a bank awarded the use of the public money to tender a good and sufficient bond issued by a surety company, or to furnish good and sufficient security in a sum not less than twenty per cent. in excess of the maximum amount at any time to be deposited in said bank, the maximum amount to be deposited with the depository in this case being \$250,000. The amount of bond or security to be furnished was \$300,000.

The ordinance further provided that the undertaking should be conditioned for the receipt, safe-keeping and payment over of all moneys which might come into the custody of the bank under and by virtue of the ordinance, together with interest at the rate specified in the proposal of the bank, and further conditioned for the faithful performance by the bank or depository of all duties and obligations imposed by the laws of the state of Ohio.

The Euclid Avenue Trust Company procured bonds from eight surety companies, the names of

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the companies and the penalties of their respective bonds being as follows:

| | |
|---|-----------|
| The National Surety Co..... | \$20,000 |
| The United States Fidelity & Guaranty Co. | 35,000 |
| The American Bonding Co. | 15,000 |
| The Aetna Indemnity Co. | 50,000 |
| The Fidelity & Deposit Co. | 25,000 |
| The Fidelity & Casualty Co. | 50,000 |
| The Metropolitan Surety Co. | 20,000 |
| The United Surety Co. | 10,000 |
| <hr/> | |
| Aggregating | \$225,000 |

As stated by the circuit court, all these bonds were identical in form, except as to the amounts of the penalties of the bonds, the names of the bonding companies and the dates of the bonds, and all were executed and placed in the hands of the Depositary Commission of the city of Cleveland at various dates prior to June 29, 1907, on which date all were approved, the form of these bonds, except as to the names of the surety companies and the amounts, being as follows:

"American Bonding Company of Baltimore, Home Office, Baltimore, Md. Know All Men by These Presents that we, The Euclid Avenue Trust Company, of the City of Cleveland, County of Cuyahoga, and State of Ohio (hereafter called the Principal) as Principal, and the American Bonding Company of Baltimore, a corporation of the state of Maryland (hereinafter called the Surety) as Surety, are held and firmly bound unto the City of Cleveland, of the County of Cuyahoga and State of Ohio, hereinafter called the Obligee, in

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the sum of Fifteen Thousand (\$15,000) Dollars, for the payment whereof said Principal and said Surety bind themselves, their successors, assigns, executors, administrators and heirs, firmly by these presents. The condition of the above obligation is such, that whereas, on the 7th day of November, 1906, the Depositary Commission of the City of Cleveland, under and by virtue of the provisions of the laws of the state of Ohio, and of certain ordinance known as Ordinance No. 44,229, passed by the Council of the City of Cleveland on the 2nd day of May, 1904, and as amended by Ordinance No. 3,084, passed by the Council of the city of Cleveland, February 6th, 1906, did award to the Principal above named the custody of a proportionate amount of the public money of the city of Cleveland in the hands of the treasurer thereof, to-wit, fifty eighteen-hundredths ($50/1800$), said amount at no time to be in excess of Two Hundred and Fifty Thousand Dollars (\$250,000) for a period of three years from the 1st day of July, 1907, to and including the 30th day of June, 1910; said award and said deposit to be subject to all the provisions and requirements of law, as the same are set forth in the laws of the state of Ohio and said ordinance. Now, therefore, if the said Principal shall well and truly receipt for all moneys deposited by the treasurer of the city of Cleveland, with it hereunder, and shall safely keep and pay over the same, as provided by the laws of the state of Ohio, and by the terms of said ordinance No. 44,229, and as amended by ordinance No. 3,084, passed by the council of the city of Cleveland, Feb-

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ruary 6th, 1906, and shall well and truly pay all sums deposited, and interest thereon at four and one-twentieth per cent. (4 1/20 per cent.), as specified in its proposal upon which the award herein referred to is made, and shall further faithfully perform all the duties and obligations imposed by the laws of the state of Ohio and said ordinance upon said Principal as depositary of said public money, then this obligation to be void; otherwise to remain in full force and virtue, Provided, however, and upon the following express conditions: First, That in the event of default on the part of the Principal herein, the Surety shall only be liable hereunder for such proportion of the total loss thereby sustained by the Obligee as the penalty of this bond shall bear to the total amount of bonds, namely, Three Hundred Thousand Dollars (\$300,000), which said Principal shall or should furnish in accordance with the provisions of the depositary ordinance of the city of Cleveland; and provided that the Surety shall not, in any event, be liable for an amount in excess of fifteen thousand dollars. Second, That in the event of any default on the part of the Principal, written notice thereof, with a verified statement of the facts showing such default, and the date thereof, shall within ten (10) days after its discovery by the Depositary Commission of the City of Cleveland, be delivered to the Surety at the address given above. Third, that the Surety shall not be liable for any deposits made by the treasurer of the City of Cleveland with the Principal herein, after the discovery of any such default is made known to said treasurer.

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Signed and sealed this twenty-first day of February, A. D. 1907.

"THE EUCLID AVENUE TRUST COMPANY,

"By *W. H. Crafts*, Pres.

"(SEAL) ATTEST: *R. S. Thomas*, Sec'y & Treas.

"AMERICAN BONDING COMPANY OF BALTIMORE,

"By *H. H. Stryker*, 4th Vice President.

"ATTEST: *R. C. Carson*, Secretary."

On the day that these bonds were approved, The Euclid Avenue Trust Company entered into a contract with the city, of which contract the surety companies executing the bonds, excepting the Fidelity & Deposit Company, had no notice or knowledge, which contract is as follows:

"Whereas, The Euclid Avenue Trust Company has been awarded a proportionate part of the public money of the City of Cleveland, in the hands of the treasurer of said city equal to fifty eighteen-hundredths ($50/1800$) thereof, in no event to exceed the sum of two hundred fifty thousand dollars (\$250,000); and Whereas, said The Euclid Avenue Trust Company is required by law and ordinance to enter into bonds with suitable guaranty, or to make deposit of approved securities with the Depositary Commission of the city of Cleveland in the aggregate sum of not less than three hundred thousand dollars (\$300,000), so conditioned as to guarantee and secure the performance of all the things to be done and performed by said The Euclid Avenue Trust Company as a depositary of the public money of the city of Cleveland; Now, therefore, this agreement witnesseth that in fulfillment of the obligation above set forth

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The Euclid Avenue Trust Company has executed and tendered to the city of Cleveland bonds signed by it and secured by the following surety companies, to-wit:

| "NAME. | AMOUNT. |
|---|----------|
| National Surety Co. | \$20,000 |
| United Surety Co. | 10,000 |
| U. S. Fidelity & Guaranty Co. | 35,000 |
| American Bonding Co. | 15,000 |
| Aetna Indemnity Co. | 50,000 |
| Fidelity & Casualty Co. | 50,000 |
| Fidelity & Deposit Co. of Maryland | 25,000 |
| Metropolitan Surety Co. | 20,000 |

"And further, and in addition thereto has this day deposited in the safety deposit box in the vaults of the Cleveland Trust Company the following securities:

| "NAME. | PAR. | LATEST QUO. | MARKET |
|---|----------|----------------|----------|
| Newburg, O., 4% Water Works Bonds, due April 15, 1926. | \$43,000 | \$102.50 | \$102.50 |
| Cleveland, O., 5% Street Improve- ment Bonds, due November 1, 1909. | 14,000 | 102.36 | 102.36 |
| Akron, O., 4% Sewer Bonds, due \$4,000 Dec. 1, 1908, and \$4,000 due Dec. 1, 1909 | 8,000 | 100.25 | 100.25 |
| Elyria, O., 4% Water Works Bonds, due 1917 | 10,000 | 102.00 | 102.00 |

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"All of which bonds and securities so deposited have been examined and approved by the Depositary Commission of the City of Cleveland and are deposited by the said The Euclid Avenue Trust Company in said safety deposit box, whereto the said The Euclid Avenue Trust Company and the said the Depositary Commission of the City of Cleveland each have keys under and subject to the following conditions and stipulations:

"1. The securities so deposited by the said The Euclid Avenue Trust Company shall be held to all effects and purposes to guarantee that the said Euclid Avenue Trust Company will well and truly receipt for all moneys deposited by the treasurer of the city of Cleveland with it under and by virtue of the award made to the said The Euclid Avenue Trust Company on the 7th day of November, 1906, for three years, beginning July 1st, 1907, to and including the 30th day of June, 1910, and that the said The Euclid Avenue Trust Company shall safely keep and pay over the same as provided by the laws of the state of Ohio, and by the terms of ordinance No. 44,229, and as amended by ordinance 3,084, passed by the council of the City of Cleveland February 6th, 1906, and shall well and truly pay all the sums deposited, and interest thereon at the rate of 4.05 per cent., as specified in its proposal upon which the award herein referred to is made and shall further faithfully perform all the duties and obligations imposed by the laws of the state of Ohio and by said ordinances upon the said Euclid Avenue Trust Company as a depositary of said public money.

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"2. In the event of any default on the part of the said The Euclid Avenue Trust Company in the performance of the things by it to be performed by virtue of the award herein referred to, then the city of Cleveland, acting by and through its depositary commission, shall have the first claim of any other creditor of the said The Euclid Avenue Trust Company, and the said city of Cleveland, acting by and through its depositary commission, shall have the right to sell and dispose of the securities so deposited, or any securities substituted therefor, until any such default has been made good to the City of Cleveland.

"3. The Euclid Avenue Trust Company reserves the right from time to time to withdraw the securities deposited hereunder and substitute in their place other securities of a character and amount acceptable to the Depositary Commission, such substitution being likewise permissible to be made by surety bonds at the option of the said The Euclid Avenue Trust Company.

"4. The city of Cleveland reserves the right at any time to demand and The Euclid Avenue Trust Company agrees to supply upon such demand, such additional security for the deposits to be made under and by virtue of said award as may to the opinion of said Commission be just and reasonable.

"5. The securities deposited as herein referred to shall remain deposited in the safety deposit box and no access shall be had thereto by either party hereto except in the presence of a representative of the other party, and the Depositary Commission agrees upon request of The Euclid Avenue Trust

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Company to send a representative to be present to permit the withdrawal of the securities so deposited for the taking of the coupons therefrom or to carry out any other order with regard thereto which has been submitted to and approved by the Depositary Commission. Witness our hands this day of June 29th, A. D. 1907.

"THE EUCLID AVENUE TRUST COMPANY,
"By *R. S. Thomas*, Sec'y & Treas.

"THE DEPOSITARY COMMISSION,
"By *Tom L. Johnson*, Pres.
"C. H. Nau, Sec'y."

On the same day—June 29, 1907—in pursuance of the foregoing contract, The Euclid Avenue Trust Company deposited with the Depositary Commission securities of the face value of \$75,000, being the securities mentioned in the contract, and, thereupon, the eight surety company bonds, aggregating \$225,000, and the collateral contract, with the securities referred to, were approved by the city, and said depositary contract became effective.

In the month of July, 1907, under an arrangement between the city and the depositary, the Elyria water works bonds (\$10,000) were withdrawn from the possession of the city of Cleveland and street improvement bonds of Cleveland, in the same amount, substituted therefor, and there were then with the city \$24,000 Cleveland improvement bonds.

On the 21st day of October, 1907, by virtue of the provisions of Section 3 of the contract of June 29, 1907, between the city and The Euclid Avenue

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Trust Company, \$22,000 of the Newburg bonds, all the Cleveland improvement bonds (\$24,000) and the Akron sewer bonds (\$8,000) were withdrawn by the depositary from the possession of the city, and a surety bond in the penal sum of \$54,000, executed by The Fidelity & Deposit Company of Maryland, as surety, was given to and accepted by the city, this bond being the same form and in the same language, except as to dates, parties and amounts, as the other surety companies' bonds approved by the Depositary Commission on June 29, 1907. So that, on the 21st day of October, 1907, the city had as security for the deposit with the depositary the eight bonds aggregating in amount \$225,000, the \$54,000 bond of The Fidelity & Deposit Company of Maryland and the remainder of the Newburg bonds (\$21,000)—in all \$300,000. On said date the securities aggregating \$54,000, which had been withdrawn by the depositary, were sold. The amount realized thereon—\$54,000—was loaned to a concern known as The Avenue Apartment Company, which loan was secured by a mortgage on the property of this company, executed on said 21st day of October, 1907. This mortgage was on that date deposited with the Fidelity & Deposit Company as collateral security for its bond of \$54,000 given to the city, which bond was accepted by the city as a substitute for the securities withdrawn.

The circuit court found that this was done pursuant to an arrangement among the city, the depositary, the apartment company and The Fidelity & Deposit Company of Maryland, the surety on the \$54,000 bond, and further found that the

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latter company had collected and held in its possession one year's interest upon the mortgage in the sum of \$3,240.00, and had expended and incurred liabilities in the collection of interest upon the mortgage the sum of \$250.00.

On the 18th day of November, 1907, the National Surety Company, one of the companies whose bonds were accepted on June 29, 1907, demanded and received from the depositary certain promissory notes aggregating \$12,975.00, secured by mortgage on real estate. This was done in pursuance of certain stipulations contained in the application which the depositary had made to the National Surety Company, on the basis of which it wrote its bond, which stipulation was in substance that the depositary would at all times indemnify and keep indemnified the National Surety Company and save it harmless from and against all claims, demands, etc.

The circuit court found that the National Surety Company had expended and incurred liability in the collection of the notes and mortgages in its possession in the sum of \$1,200.00.

Deposits had been made from time to time with the depositary, and on the 8th day of May, 1908, there was due the city from it, in its capacity as city depositary, the sum of \$174,361.99, on which day said depositary, The Euclid Avenue Trust Company, made an assignment for the benefit of its creditors to The Cleveland Trust Company.

On said date the city had in its possession property of the depositary—being the remainder of the Newburg water works bonds—of the face value of \$21,000, which were shortly afterwards sold by

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the city and the proceeds thereof—\$21,025.95—applied to its claim of \$174,369.99, leaving due a balance of \$153,336.04, which, on the 22d day of May, 1909, was allowed by the assignee as a valid claim in favor of the city.

The city, after the assignment of the depositary, demanded of the surety companies payment upon their bonds, and the circuit court found the net amounts paid by each surety company to be as follows:

| | |
|---|---------------|
| "The National Surety Co. | \$10,991.83 |
| The U. S. Fidelity & Guaranty Co. . . . | 19,235.70 |
| American Bonding Co. | 8,243.88 |
| The Aetna Indemnity Co. | 27,479.58 |
| The Fidelity & Deposit Co., on its \$25,000 bond | 13,739.77 |
| The Fidelity & Deposit Co., on its \$54,000 bond | 29,677.96 |
| The Fidelity & Casualty Co. | 27,479.57 |
| The Metropolitan Surety Co. | 10,991.83 |
| The United Surety Co. | 5,495.92 |
| <hr/> | |
| "Aggregating | \$153,336.04" |

These payments having been made by the several surety companies, the city assigned separately to each of the companies a pro rata fractional share of its claim against the depositary.

On the 2nd day of May, 1909, plaintiff in error herein, The Assets Realization Company, a corporation organized under the laws of the state of New Jersey, purchased all the assets and property, both personal and real, except cash, in the hands of the assignee of The Euclid Avenue Trust Com-

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pany, as of the date of the close of business on the 7th day of April, 1909, and agreed to pay the sum of \$200,000 in cash and all the unpaid costs, fees and expenses of the administration of said estate; also all expenses and cash disbursements of the assignee and court costs and attorney fees in the closing of the assignment, all to be in such amount as might be fixed by the court having jurisdiction of said assignment in case said company did not agree with the assignee in reference thereto.

The Assets Realization Company further agreed to pay to the assignee on demand such additional sum as would be necessary to enable the assignee to pay a dividend of fifty per cent. on the face amount of all claims of general creditors theretofore presented and allowed.

On the 11th day of June, 1909, The Cleveland Trust Company, assignee, executed and delivered to The Assets Realization Company a conveyance of all the assets of The Euclid Avenue Trust Company, and in pursuance of the terms of said sale The Assets Realization Company paid the sum of \$200,000, and, in addition thereto, the sum of \$18,473.91, which, with other funds in the hands of the assignee available for the payment of dividends, amounted to \$19,600.00, which, with interest computed to January 1, 1911, amounted to \$20,709.98.

The court of insolvency of Cuyahoga county, in which court the assignment was pending, ordered the assignee of The Euclid Avenue Trust Company to pay said sum of \$20,709.98 to the several surety companies to apply on dividends which might be found due them upon the determi-

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nation of the cause, and by said order such payment to the surety companies and the expenses thereof were to be without prejudice to the claims or rights of any of the parties to the cause as the same might be finally determined.

The amount ordered to be paid was paid to the surety companies, except the sum of \$4,007.59, applicable to the \$54,000 bond of The Fidelity & Deposit Company of Maryland. The court of insolvency in April, 1909, ordered a payment of a dividend of twenty per cent. to the general creditors of the assignor, and on the same date made an order finding that certain claims had been presented for allowance and that the same had been allowed, but that the payment was to a certain extent secured, and to cover any liability to said secured creditors, after the exhausting of their collateral, there should be reserved an amount sufficient to pay a like dividend on valid claims to the amount of \$98,000. This amount was the amount then estimated by the assignee as the amount of the claim of the city of Cleveland arising upon its deposits with the depository after deducting the value of the collateral held by the National Surety Company and The Fidelity & Deposit Company of Maryland.

In July, 1909, an order for the payment of a dividend of thirty per cent. was made by the court of insolvency to the general creditors, which order did not include the claim of the city of Cleveland or its assigns. The circuit court found that all of the dividends ordered to be paid to the general creditors had been paid by the assignee.

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The circuit court found that on the 11th day of June, 1909, the date of the transfer and delivery to The Assets Realization Company of the assets of The Euclid Avenue Trust Company, the face amount of the claim of the city, as allowed by the assignee, was \$153,336.04, that a fifty per cent. dividend upon said claim without applying the collateral in the hands of the National Surety Company and The Fidelity & Deposit Company of Maryland in reduction of said claim, amounted to \$76,668.02 and that the funds in the hands of the assignee available for the payment of said dividend amounted to \$19,600.00, and that the amount necessary to be paid by The Assets Realization Company to The Cleveland Trust Company, as assignee, to enable the assignee to pay the fifty per cent. dividend, amounted to \$57,068.02.

The circuit court found, as its conclusions of law, as follows:

"1. There is due from The Assets Realization Company, under the terms of its contract to purchase, to the several surety companies, parties herein, as assignees of the city of Cleveland, in proportion to the amount of their respective bonds, the sum of \$57,068.02, with interest from June 11, 1909, which said sum, with interest to January 16, 1911, amounts to \$62,489.48, for which said amount, with interest from January 16, 1911, judgment is rendered against The Assets Realization Company in favor of each of the said surety companies, as follows:

| | |
|------------------------------------|------------|
| "National Surety Co..... | \$4,479.55 |
| U. S. Fidelity & Guaranty Co. | 7,839.12 |

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| | |
|---|-------------|
| American Bonding Co. | 3,359.65 |
| The Aetna Indemnity Co. | 11,198.85 |
| Fidelity & Deposit Co. | 17,694.15 |
| Fidelity & Casualty Co. | 11,198.85 |
| John F. Yawger, receiver of The Metro- politan Surety Co. | 4,479.55 |
| United Surety Co. | 2,239.76 |
| <hr/> | |
| “Total | \$62,489.48 |

“2. The court further finds that said eight original surety companies, whose bonds were accepted by said city on June 29, 1907, were and should be held to be co-sureties; and that upon the execution of its \$54,000.00 bond, given on or about October 21, 1907, The Fidelity & Deposit Company became and should be held to be a co-surety upon said bond with said eight original bonds. And all the collateral and security of every kind and nature, placed in the hands of or pledged with the National Surety Company and The Fidelity & Deposit Company of Maryland, or either of them, as indemnity for loss which they, or either of them, might suffer by reason of the execution of said bonds, should be and is held by them for the benefit of all said surety companies so found to be co-sureties, and should be collected and the proceeds thereof distributed among the said surety companies pro rata, in proportion to the amounts of their respective bonds.

“3. It is ordered and decreed that Frank M. Chandler, upon his qualifying and giving bond in the sum of \$75,000.00 with sureties to the approval of the clerk of this court, be, and hereby is,

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appointed receiver to take charge of and collect all of the said collateral or the proceeds of said collateral in the hands of the National Surety Company and The Fidelity & Deposit Company. And the National Surety Company is hereby ordered to turn over to said receiver the proceeds of all collateral collected by it, less the sum of \$1,200.00, its charges and expenses, which is hereby allowed, and less the amount hereby ordered to be paid to it, and to turn over all uncollected collateral in its hands. And The Fidelity & Deposit Company is hereby allowed to retain the money collected by it as interest upon said collateral to apply upon the amount hereby adjudged to it and upon its charges in the sum of \$250.00, which is hereby allowed, and is hereby ordered to turn over to said receiver all uncollected collateral held by it as indemnity for its bonds. And the said receiver is hereby ordered to forthwith collect, foreclose, or sell, subject to the approval of this court, all of said uncollected collateral hereby ordered to be turned over to him, and to distribute and pay said moneys so turned over to and to be collected by him as follows:

- (1) To pay the costs of this action so far as they have now accrued, including therein the sum of \$7,500 to the plaintiff's counsel for services rendered herein in behalf of all surety companies.
- (2) To pay all the balance of the said moneys so coming into his hands forthwith to the surety companies, parties herein, distributing the same pro rata according to the amount of their respective bonds.

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"4. It is ordered and decreed, that the defendant, The Assets Realization Company, at its option, may take any of said uncollected collateral by paying to the receiver the face value thereof, with accumulated interest due thereon.

"5. It is further ordered and decreed that, in the event that the net amount collected by the receiver applicable to the payment of the surety companies, in accordance with the terms of this decree, together with the amounts paid to the surety companies by The Assets Realization Company and The Cleveland Trust Company, assignee, under the terms of this decree, shall exceed the net amount paid the city of Cleveland by said surety companies, as herein found, including interest from the date of payment to the city of Cleveland, that such excess shall be paid to the defendant, The Assets Realization Company."

Plaintiff in error, The Assets Realization Company, in its petition in error in this court, is asking that the judgment of the circuit court be reversed. The Fidelity & Deposit Company of Maryland and the National Surety Company, in their cross-petitions in error, are asking that the judgment of the circuit court, against them, be reversed.

Messrs. Blandin, Rice & Ginn, for plaintiff in error.

1. Under their contracts the various bonding companies, defendants in error herein, are not co-sureties, and therefore the rules of equity applicable to the relation of co-suretyship should not control the disposition of the collateral

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deposited with the National Surety Company and The Fidelity & Deposit Company of Maryland.

We claim this is true, because:

(a) The liability on each bond was limited by contract, and such liability was not affected by the payment or non-payment of the share of loss covered by any other bond or security. *Leggett v. McClelland*, 39 Ohio St., 626; 4 Pomeroy on Equity Juris. (3 ed.), Sec. 1418; Stearns on Suretyship, Sec. 280; *Coope v. Twynam*, 1 Turn. & R., 426; *Pendlebury v. Walker*, 4 Y. & C. Exch., 424; *Moore v. Isley*, 2 Dev. & B. Eq. (22 N. Car.), 372; 1 Brandt on Suretyship (3 ed.), Sec. 285; *In re Keily*, 9 Irish Ch., 87; *American Surety Co. v. Boyle*, 65 Ohio St., 493; *Robinson v. Boyd*, 60 Ohio St., 57; *Smith v. Folsom*, 80 Ohio St., 219.

(b) Companies acting as sureties for hire cannot claim equities prevailing between gratuitous sureties. Richards on Insurance Law (3 ed.), Sec. 469; Frost on Guaranty Insurance (2 ed.), Sec. 4; *Supreme Council Catholic K. of A. v. Fidelity & Casualty Co.*, 63 Fed. Rep., 48; *Mechanics Sav. Bank & Trust Co. v. Guarantee Co. of N. A.*, 68 Fed. Rep., 459, 80 Fed. Rep., 766, 26 C. C. A., 146; *Atlantic Trust & Deposit Co. v. Town of Laurinburg*, 163 Fed. Rep., 691.

(c) Collateral in the hands of the National Surety Company and The Fidelity & Deposit Company of Maryland in excess of amount necessary to fully indemnify said companies, should be awarded to the plaintiff in error.

2. Collateral pledged by the principal with one or more sureties is primarily applicable to reduce the creditor's claim.

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(a) Collateral deposited as indemnity for one surety should not be considered as indemnity for all other sureties, but as a trust fund for the better security of the debt and to be applied thereto. *State Natl. Bank v. Esterly*, 69 Ohio St., 24; 1 Story on Equity Juris. (2 ed.), Secs. 499, 502, 638; *Chamberlain v. St. Paul & S. C. Rd. Co.*, 92 U. S., 306; *Penderly v. Allen*, 50 Ohio St., 130; 6 Pomeroy on Equity Juris. (3 ed.), Sec. 922, p. 1504; *Green v. Dodge*, 6 Ohio, 80; *New Bedford Inst. for Sav. v. Fairhaven Bank*, 9 Allen (Mass.), 178; *Kelly, Guardian, v. Herrick*, 131 Mass., 373; *Paris v. Hulett*, 26 Vt., 308; *Heath v. Hand*, 1 Paige (N. Y.), 329; *Leggett v. McClelland*, 39 Ohio St., 626.

(b) Under the statutes of Ohio, creditors must account for property of principal deposited for better security of debt before participating in distribution of general funds of an insolvent estate. *Chemical Natl. Bank v. Armstrong*, 59 Fed. Rep., 372, 8 C. C. A., 155, 28 L. R. A., 231; *State Natl. Bank v. Esterly*, 69 Ohio St., 37; *Mannix, Assignee, v. Purcell*, 46 Ohio St., 135; *Barret v. Reed, Wright*, 700; *In re Spence, Assignor*, 7 O. D., 386, 4 N. P., 439; *Searle v. Brumback*, 2 O. D., 653.

(c) General creditors are those who hold no security of any kind deposited by the principal, and to them alone are dividends due and payable. *Searle v. Brumback, supra*; *In re Spence, Assignor, supra*.

(d) The bond of \$54,000, the second bond given by The Fidelity & Deposit Company of Maryland, being a substitution under the terms

Argument for Defendant in Error.

of the depository contract, the collateral deposited therewith must be applied to the claim of the city. *Collum v. Emanuel & Gaines*, 1 Ala., 29; *American Surety Co. v. Boyle*, 65 Ohio St., 493.

3. The circuit court erred in allowing plaintiffs' counsel attorneys' fees as a part of the costs of the case. *Hopple v. Hopple*, 14 Dec., 285; 3 Am. & Eng. Ency. Law (2 ed.), 459; *B. & O. Rd. Co. v. Brown*, 79 Md., 442; *Commonwealth v. Mechanics Mutl. Fire Ins. Co.*, 122 Mass., 421; *Reed v. Terhune*, 22 O. C. C., 544; *Richter v. Schoenfeldt*, 1 W. L. B., 133, 7 Dec. R., 120; *McLain v. Simington*, 37 Ohio St., 660; *Shaw v. Fifth Ward Bldg. Assn.*, 6 O. C. C., 46, 3 Cir. Dec., 340; *Ingham v. Lindemann*, 37 Ohio St., 218.

4. The circuit court erred in awarding judgment against the plaintiff in error for the payment of dividends.

The court of insolvency has jurisdiction of the funds of the estate of The Euclid Avenue Trust Company, and to it alone is jurisdiction given to make orders for the payment of dividends out of such funds. *Owens v. Ramsdell*, 33 Ohio St., 441; *Clapp v. Huron County Banking Co.*, 50 Ohio St., 528; *Lindemann v. Ingham*, 36 Ohio St., 12; *Emmitt v. Brophy*, 42 Ohio St., 82; *Bagaley & Co. v. Waters*, 7 Ohio St., 359; *Thompson v. Thompson*, 4 Ohio St., 333; *Crumbaugh v. Kugler*, 3 Ohio St., 544.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, for The Fidelity & Deposit Company of Maryland, defendant in error.

Argument for Defendant in Error.

This controversy, so far as it relates to the claims of The Fidelity & Deposit Company, is confined solely to the security held by it as indemnity in connection with its \$54,000 substitution bond.

The Fidelity & Deposit Company denies that the \$54,000 substitution bond ever became or stood in the relation of a co-surety with the eight original bonds. We claim: (1) That even if the court is able to find that the eight original bonding companies were among themselves co-sureties on their eight separate and independent bonds, yet as to this \$54,000 substitution bond, the relation of co-surety with the other bonds never was assumed and did not exist; (2) that even if the \$54,000 bond had become a co-surety with the original eight bonds, yet the circumstances were such that it should not be required to prorate its indemnity with the other bonds; and (3) that the rights and equities of the parties in connection with the property here in question did not depend upon co-suretyship at all, but should be governed by the equitable situation created by the fact that the city received collateral security when the original agreement was made; and also by the express contract made at the time when the city received the collateral security, and later, when the \$54,000 substitution bond was given.

1. The \$54,000 substitution bond did not become a co-surety. *Cook v. Tullis*, 18 Wall., 332, 21 L. Ed., 933; *Sawyer v. Turpin*, 91 U. S., 120, 23 L. Ed., 235; *Stewart v. Platt*, 101 U. S., 742, 25 L. Ed., 816; *Clark, Assignee, v. Iselin*, 21

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Wall., 360, 22 L. Ed., 568; Stearns on Suretyship, Sec. 281, p. 517, Sec. 295; *Oldham v. Broom*, 28 Ohio St., 41; 1 Brandt on Suretyship and Guaranty (3 ed.), Sec. 287.

2. The substitution bond should not be required to prorate its indemnity, even if it had become a co-surety. *Leggett v. McClelland*, 39 Ohio St., 624; *American Surety Co. v. Boyle*, 65 Ohio St., 486.

3. As to the equities of the parties and their rights in the collateral securities, the city, to the extent that it held collateral in which the eight surety companies might be interested, became in equity a trustee, holding a trust fund. Stearns on Suretyship, Secs. 98, 267, 274; *Day v. Ramey & Co.*, 40 Ohio St., 446; *Leggett v. McClelland*, *supra*, 625; *Pendery v. Allen*, 50 Ohio St., 130; *Henderson-Achert Litho. Co. v. John Shillito Co.*, 64 Ohio St., 250.

The eight original surety companies were not parties to this collateral contract, so that their rights in the collateral securities could not arise directly from the agreement itself. They could acquire rights therein only in equity, by being subrogated to the rights of the city, by reason of paying its loss. 6 Pomeroy on Equity Juris. (3 ed.), Sec. 922, p. 1504; 27 Am. & Eng. Ency. Law (2 ed.), 226; Stearns on Suretyship, Sec. 273; *Advance Thresher Co. v. Hogan*, 74 Ohio St., 314.

When the collateral contract and securities were originally pledged by the bank with the city, they constituted a trust fund charged with the payment of the bank's debt and to secure the same.

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Any person taking this property from the city, with knowledge of the trust, took the securities subject to the terms of that trust and the rights of all the sureties. Stearns on Suretyship, Secs. 98, 267, 272, 274; 32 Cyc., 216; *Day v. Ramey & Co.*, *supra*; 6 Pomeroy on Equity Juris. (3 ed.), Sec. 923; *Atwood v. Vincent*, 17 Conn., 575.

4. As to allowance of attorneys' fees to plaintiffs' counsel, we contend that where a fund is brought into court, out of which numerous parties receive a benefit, it is proper and usual to allow to the plaintiff producing such fund his counsel fees while acting for the common benefit. We insist, however, that even in such an action, the defendant against whom the judgment is entered, should not be compelled to join in making such payment.

Messrs. Kline, Tolles & Morley, for the National Surety Company, defendant in error.

1. The several bonding companies, defendants in error, are not co-sureties. *Deering v. Earl of Winchelsea*, 2 Bos. & Pul., 270; *Swain v. Wall*, 1 Ch. Rep., 150; *Coope v. Twynam*, 1 Turn. & R., 425; Stearns on Suretyship, Sec. 280, p. 515; *Wells v. Miller*, 66 N. Y., 265; *Robinson v. Boyd*, 60 Ohio St., 57; *Agnew v. Bell*, 4 Watts (Pa.), 32; *Russell v. Failor*, 1 Ohio St., 327; 4 Pomeroy's Equity Juris. (3 ed.), Sec. 1418; *Oldham v. Broom*, 28 Ohio St., 41; *Farmers Natl. Bank v. Teeters*, 31 Ohio St., 36; *Pendery v. Allen*, 50 Ohio St., 121; *Steel v. Dixon*, 17 Ch. Div., 825; *Miller v. Sawyer*, 30 Vt., 412; *Leggett v. McClelland*, 39 Ohio St., 625.

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2. The bonding companies are entitled to receive full dividends on the city's claims against The Euclid Avenue Trust Company, without deduction for the collateral securities pledged with the National Surety Company and The Fidelity & Deposit Company. *Chemical Natl. Bank v. Armstrong*, 59 Fed. Rep. 372, 6 C. C. A., 155, 28 L. R. A., 231; *Merrill v. Natl. Bank of Jacksonville*, 173 U. S., 131, 43 L. Ed., 640; *People v. Remington*, 121 N. Y., 328; *In re Miller's Appeal*, 35 Pa. St., 481; *Levy v. Chicago Natl. Bank*, 158 Ill., 88, 30 L. R. A., 380.

3. The status of The Fidelity & Deposit Company of Maryland is no different from that of the National Surety Company, and if the court should find that the National Surety Company is a co-surety with the other bonding companies, then the same must be true of The Fidelity & Deposit Company of Maryland, and its security should be apportioned among all.

The fact that the bond was given at a later date than the bonds does not alter the situation, or make the latter surety company any the less a co-surety, if the terms of the bond itself admit of this relationship. *Deering v. Earl of Winchelsea*, *supra*.

4. The circuit court erred in allowing attorneys' fees to counsel for the three bonding companies, plaintiffs in the action below, payable out of the proceeds of the collateral securities deposited with The Fidelity & Deposit Company and this cross-petitioner in error. 11 Cyc., 96; *B. & O. Rd. Co. v. Brown*, 79 Md., 442.

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Messrs. Stearns, Chamberlain & Royon; Messrs. M. B. & H. H. Johnson and Mr. T. H. Hogsett, for the American Bonding Company of Baltimore, The United States Fidelity & Guaranty Company, the Fidelity & Casualty Company and John F. Yawger, receiver of the Metropolitan Insurance Company, defendants in error.

1. All of the surety companies are co-sureties, and are entitled to share, in proportion to the amount of their respective risks at the time of the failure of The Euclid Avenue Trust Company, in the collateral held by The Fidelity & Deposit Company of Maryland and the National Surety Company.

(a) The relation of co-suretyship existed among the surety companies executing the eight original bonds. Childs' Suretyship and Guaranty, 321; 7 Am. & Eng. Ency. Law (2 ed.), 334; *Armitage v. Pulver*, 37 N. Y., 494; *Farmers Natl. Bank v. Teeters*, 31 Ohio St., 36; *American Surety Co. v. Boyle*, 65 Ohio St., 486; *Swisher v. McWhinney*, 64 Ohio St., 343; *Deering v. Earl of Winchelsea*, 2 Bos. & Pul., 270.

(b) The second bond in the penal sum of \$54,000, executed by The Fidelity & Deposit Company of Maryland, stands on the same footing as the eight original bonds, and the collateral given to secure this bond should be shared ratably by all of the bonding companies.

2. The surety companies are entitled to receive from The Assets Realization Company a dividend of fifty per cent. on the claim of the city allowed by the assignee, together with interest thereon

Argument for Defendants in Error.

from June 11, 1909, less certain sums heretofore paid in.

(a) The city of Cleveland was entitled to receive from the assignee a dividend of fifty per cent. on its claim as allowed.

It is the law in most jurisdictions, that where a creditor himself has collateral security for his claim against an insolvent debtor, such creditor may collect his dividend upon the entire claim and apply his collateral to the payment of the balance. 3 Am. & Eng. Ency. Law (2 ed.), 341; *Chemical Natl. Bank v. Armstrong*, 59 Fed. Rep., 376, 8 C. C. A., 155.

This honorable court, however, has within certain limits held contrary to the great body of authority above referred to, and has ruled that where collateral held by a creditor has been reduced to money and actually applied on the debt before a dividend is declared from the estate of the insolvent debtor, the creditor is entitled only to a dividend on the balance. *State Natl. Bank v. Esterly*, 69 Ohio St., 24.

The rule laid down in the Esterly case has no application to the present case. The collateral in the present case was not realized upon before the dividend was declared.

The Assets Realization Company does not represent the creditors of the insolvent estate, and the payment of full dividends to the surety companies will not reduce the amounts received by the general creditors.

In the present case it is the surety and not the creditor who holds the collateral. *Meed v. Nelson*, 9 Gray (Mass.), 55; *Provident Inst. for Sav. v.*

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Stetson, 12 Gray (Mass.), 27; *Hale v. Leatherbee*, 175 Mass., 547; *Viles v. Harris*, 130 Mass., 300.

(b) The surety companies are entitled to receive from the assignee a fifty per cent. dividend on the claim of the city of Cleveland as allowed.

The surety companies have the same rights to dividends which the city had.

The right of the surety companies to receive dividends is not affected by the fact that they held collateral given them by the principal debtor to indemnify them against loss on their respective bonds.

The city of Cleveland had no property right in the collateral in question and no trust in its favor was created. Prior to insolvency a surety to whom security has been given may, without the knowledge or consent of the creditor, release or assign the security given him. *Jones v. Quinpiack Bank*, 29 Conn., 25; *Ames Cases on Suretyship*, 647; *Ohio Life Ins. & Trust Co. v. Reeder et al.*, 18 Ohio, 35; *Henderson-Achert Litho. Co. v. John Shillito Co.*, 64 Ohio St., 236; *Curry v. McCauley*, 11 Fed. Rep., 365; *Merchants Natl. Bank v. Comstock*, 55 N. Y., 24.

(c) The surety companies are entitled to receive from The Assets Realization Company a fifty per cent. dividend on the city's claim as allowed, together with interest.

The Assets Realization Company, by its contract of purchase, agreed to pay this amount.

The courts below had jurisdiction to order The Assets Realization Company to pay the dividends to the surety companies. *Touche v. Met. Ry. Warehousing Co.*, L. R., 6 Ch., 671; *Gandy v.*

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Gandy, 30 Ch. Div., 57; *Houghton v. Milburn*, 54 Wis., 554; *Rothwell v. Skinker*, 84 Mo. App., 169; *Town of Gastonia v. McEntee-Peterson Engineering Co.*, 131 N. Car., 363; *Lyman v. City of Lincoln*, 38 Neb., 794; *King v. Downey*, 24 Ind. App., 262; *Glencoe Lime & Cement Co. v. Wind*, 86 Mo. App., 163; *Knight & Jillson Co. v. Castle*, 172 Ind., 97, 27 L. R. A., N. S., 573; *Johannes v. Phoenix Ins. Co.*, 66 Wis., 50; *Vandenbark v. Mattingly et al.*, 62 Ohio St., 25.

(d) The court below did not err in ordering interest to be paid on the dividends found to be due the surety companies. *Champion Ice Mfg., etc., Co. v. Pennsylvania Iron Works Co.*, 68 Ohio St., 234.

(e) Plaintiffs below were entitled to have their attorneys' fees paid out of the fund which they brought into court for distribution. *Trustees v. Greenough*, 105 U. S., 527; *Central Rd. & Banking Co. v. Pettus*, 113 U. S., 116; *In re Weed's Estate*, 163 Pa. St., 595; *Anniston Loan & Trust Co. v. Ward*, 108 Ala., 85.

Mr. David H. Scott, for the Aetna Indemnity Company, defendant in error.

1. The sureties are co-sureties and entitled to all the equities of that relation. *Deering v. Earl of Winchelsea*, 2 Bos. & Pul., 270, 1 Cox, 318; *Pendlebury v. Walker*, 4 Y. & C. Exch., 424; 1 White & Tudor's Leading Equity Cases, 124.

In the case at bar the eight bonding companies were sureties for the common principal, and all were liable for their pro rata of any loss, whether the same be great or small, one dollar or one hundred and fifty-four thousand odd dollars, as

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happened to be the amount of the loss here. DeColyar's Law of Guaranties, Principal and Surety (1875), 355; Frost on Guaranty Insurance (2 ed.), Sec. 284; Stearns on Suretyship, 447.

2. The collateral pledged with the National Surety Company inured to the benefit of all the surety companies.

Once having obtained indemnity from The Euclid Avenue Trust Company, the right of the National Surety Company and its co-sureties to such indemnity was superior to the rights of the assignee of the principal or the purchaser of the assets. *In re Reynolds*, 20 Fed. Cas., No. 11724; *Abbey v. Van Campen*, Freem. Ch. (Miss.), 273; *Battle v. Hart*, 17 N. Car., 31; *Craighead v. Swartz*, 219 Pa. St., 149; *Atkinson v. Tomlinson*, 1 Ohio St., 237; *Simmons Hardware Co. v. Thomas*, 147 Ind., 313; *Constant v. Matteson*, 22 Ill., 546; 32 Cyc., 246, 251; *West v. Bank of Rutland*, 19 Vt., 403.

3. The collateral taken under the second bond of The Fidelity & Deposit Company inured to the benefit of the surety companies the same as the collateral taken under the bond of the National Surety Company.

4. Counsel for plaintiffs below are not entitled to attorneys' fees out of the pro rata of collateral coming to the Aetna Indemnity Company. *Worther v. Ruehrwein*, 8 O. N. P., 495; *Hopple v. Hopple*, 14 O. D., 285.

5. The circuit court had jurisdiction to do full equity among the parties. *Emmitt v. Brophy*, 42 Ohio St., 88; 1 Chitty on Pleading (1876), 5; *Hellebush v. Richter*, 37 Ohio St., 222.

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NEWMAN, J. Plaintiff in error and defendants in error, the National Surety Company and The Fidelity & Deposit Company of Maryland, insist that the circuit court erred in holding that the unsecured bonding companies were entitled to an interest in the security held by the two secured companies.

Counsel filed elaborate briefs, most helpful to the court in reaching its conclusion. The principles of co-suretyship are ably and exhaustively considered and discussed, and the leading cases on the subject cited and analyzed.

Counsel for the unsecured bonding companies recognize the fact that each company executed a separate bond to the city of Cleveland and limited its liability, but submit that the execution of the separate obligations and the limitation in no way impaired the right of all the companies to share in the collateral held by two of them. They suggest that every test of the co-surety relation is present in this case—the bonds in question cover the same debt, are on behalf of the same debtor and the several bonds are dependent, the liability upon each being fixed by the aggregate of the bonds. The only right which is curtailed, they say, is the right of the obligee—the city of Cleveland—to recover the entire debt from any one surety; that all other rights, those so far as the obligee and the sureties are concerned and those among the several sureties, exist. They refer to the limitation of liability as a custom growing out of the change of conditions; that formerly all sureties were personal sureties and each was acquainted with the financial condition of the other and no restriction was

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necessary, but, at the present time, when bonds are written by bonding companies whose financial standing is unknown to each other, it has become necessary, "as a matter of wise protection," to restrict the amount of recovery. The reason for the limitation, so far as the rights of the parties here are concerned, seems wholly immaterial, and we might say in passing that the fact that the bonds in question are contracts of suretyship for hire, and not gratuitous, is wholly unimportant, as this is not a case for the construction of the language of bonds as between the bonding companies and the obligee, but one for the determination of the rights of the sureties among themselves, all of whom are paid sureties.

While admitting that there was a curtailment of one of the rights or incidents growing out of the relation of co-suretyship, yet counsel for the unsecured companies contend that the right to share in the collateral or securities given two of their number, being unaffected by any special agreement, stands unimpaired, and they seek to enforce that right in this action. They treat the proviso in the bonds limiting the liability of each company to that proportion of the entire loss which the penal sum mentioned in the bond bears to the total amount of the bonds and securities furnished by the depository, namely, \$300,000, as merely a contract arrangement between the companies and the obligee, and the arrangement effected was that all the companies standing together should assume the burden of the entire obligation, and not that each company should assume a separate and dis-

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tinct part of the obligation, independent of each other.

In this we think counsel are in error. The several bonding companies were not obligated to pay the same debt—they each agreed to pay an aliquot part—a fractional part of the total loss due to the default of the depository. If one of these companies failed to pay its portion, such failure, in no way, affected the liability of the other companies. No duty, legal or equitable, was owing by one company to the other.

The form of bond executed by the several companies is set out in full in the statement of facts, and the language, we think, is plain and unequivocal and can bear but one construction.

The defendant in error, The Fidelity & Deposit Company of Maryland, executed its \$54,000.00 bond at a time subsequent to the execution of the eight original bonds, but, in our opinion, it bears the same relation to the original bonds as if it had been executed at the same time.

It is well settled that where one of two or more sureties for the same obligation has paid more than his share of the debt, he is entitled to contribution from his co-sureties to reimburse him for the excess paid over his share in order to equalize the common burden.

Numerous authorities have been cited in support of this proposition, but it is to be observed that they speak of a common burden, and it is where parties are bound to discharge a common obligation that they are treated as co-sureties. It is uniformly held, as we understand it, that the re-

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lation of co-suretyship exists only where there is a right of contribution.

In the case under consideration, this right is wanting. Not one of the bonding companies was bound to equalize the loss with the others in case of default. When one company paid its portion of the loss—the portion fixed by its bond—no claim arose in its favor against any of the other companies and no further demand could be made against it. Its obligation was fully discharged and the liability terminated.

Our attention has been directed to many cases and we shall refer briefly to a few of them bearing upon the question under consideration.

The third proposition in the syllabus in *Robinson v. Boyd*, 60 Ohio St., 57, is as follows: "To give rise to the application of the doctrine of contribution between sureties, it is not necessary that there should be privity of contract between the parties, nor that the liability of each should have been incurred at the same time; all that is required is, that the debt or burthen should be common to the parties, and primarily that of the same person."

In *Hartwell v. Smith*, 15 Ohio St., 203, the court say: "The other right to which we have referred, is that of contribution, which arises in the case of co-sureties, and which each may claim as against the others who are bound with him in a common liability. Whenever several sureties stand in the relation to each other of co-sureties, by being bound for the same person, and for the same debt or engagement, so that they have a common interest, or a common burden to bear, if one of

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them be compelled to bear the whole or a part of the burden alone, he may call upon his co-sureties to equalize the burden by contribution."

In *B. & O. Rd. Co. v. Walker*, 45 Ohio St., 588, the court quotes from 2 Wait's Actions and Def., 288, as follows: "The doctrine of contribution rests upon the broad principle of justice, that where one has discharged a debt or obligation which others were equally bound with him to discharge, and thus removed a common burden, the others who have received a benefit ought in conscience to refund to him a ratable proportion. It depends rather upon principles of equity than upon contract."

It seems then that the test of co-suretyship is, as stated by counsel, common liability upon the same obligation. In the case at hand there was no common liability. Each surety, by its bond, obligated itself for a fixed portion of the debt. The authorities uniformly hold that the doctrine of contribution has its origin in the relation of co-sureties and is not founded upon the contract of suretyship; that it is an equity which springs up at the time the relation of co-sureties is entered into and ripens into a cause of action when one surety pays more than his portion of the debt. It equalizes burdens and recognizes and enforces the reasonable expectations of co-sureties, because it is just and right in good morals, and not because of any supposed promise between them. This equity having once arisen between co-sureties, this reasonable expectation that each will bear his share of the burden is, as it were, a vested right in each, and remains for his protection until

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he is released of all his liability in excess of his ratable share of the burden. *Camp et al. v. Bostwick*, 20 Ohio St., 346.

The court, in *Russell v. Faylor*, 1 Ohio St., 327, say: "The right of contribution among sureties, is founded not in the contracts of suretyship, but is the result of a general equity which equalizes burdens and benefits."

And again in *Robinson v. Boyd*, *supra*, the court says that the doctrine of contribution "is not founded on contract, but arises from the equitable consideration that persons subject to a common duty or debt, should contribute equally to the discharge of the duty or debt; and so where one performs the whole duty or pays the debt, or more than his aliquot part, each of the others should contribute to him, so as to equalize the discharge of what was a common burthen."

The bonding companies in this case, did not obligate themselves to discharge the whole debt of the depository in case of default, but an aliquot part thereof. There was no common burden to discharge. Therefore, there was no such thing as equalizing the discharge. There was no such thing as one of the sureties performing the duty of all the companies or the payment of the whole debt, but, to repeat, when one of the companies paid its portion, that was a termination of its liability, and no right arose in its favor against any of the other companies.

The case of *Deering v. The Earl of Winchelsea*, 2 Bos. & Pul., 270, an English case decided in 1787, seems to be the leading case on the doctrine of contribution among sureties. It is cited in sup-

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port of the holding of the circuit court. In this case the principal had entered into three bonds, each in the penalty of 4,000 pounds, with condition for the duly accounting of moneys coming into his hands as receiver. Deering, the plaintiff, had joined as surety in one of these bonds, and the defendants, the Earl of Winchelsea and one Rous, had each executed a bond with the principal. The latter defaulted and there was owing the obligee approximately 3,883 pounds, an amount less than the penalty of each of the bonds. A judgment in this amount having been obtained against Deering as one of the sureties, he filed a bill demanding contribution from the other parties who had signed the bonds. The real point in that case was whether there should be contribution by sureties on distinct obligations. The court held that they were bound as effectually *quoad* contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas, if they were all joined in the same engagement, they must all contribute equally, and the court uses this language: "In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What if severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burden." The decree of the court was that the plaintiff and the two defendants should contribute in equal shares to the payment of the loss—each

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should pay approximately 1,294 pounds. But in this case each surety was liable for the entire loss, provided the same did not exceed the penalty of the bond, while in the case at bar the securities were limited to a fixed proportion of the loss.

In the Deering case, in the event of default for less than 4,000 pounds, the failure of any one of the sureties to pay his share, would require the other sureties to pay more than they were equitably entitled to pay. In the case at bar, whatever the loss might be, no surety could be required to pay more than the proportion stipulated in the bond.

From our analysis of the Deering case, the relation of co-suretyship existed there because the burden was a common one, regardless of the fact that separate instruments were executed. "The bottom of contribution," the court says, "is a fixed principle of justice, and is not founded in contract. Contract, indeed, may qualify it."

Reference is made in the above case to *Swain v. Wall*, 1 Ch. Rep., 149, decided as early as 1642, where three sureties were bound for a principal, and agreed, if the principal failed, to pay their respective parts. Two of the sureties proved insolvent. The third paid the money, and one of the others becoming solvent, he was compelled to pay a third part, and not a moiety.

The Swain case is similar to the case at bar. In both cases the sureties bound themselves for a fixed portion of the debt only, and if the right of contribution did not arise in the former case, it does not exist in the case at bar.

We have examined and undertaken to analyze many of the cases cited, and counsel who challenge

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the holding the circuit court have correctly, we think, placed the cases cited by opposing counsel in two classes—one where sureties have become obligated for the same debt, but by different instruments, and the other where sureties obligated themselves for the same debt, but in stated and fixed amounts thereof, as where four sureties obligated themselves upon a general debt, which might reach \$2,000. But each agreed, in the event of default, they would pay \$500.00 thereof. In case of default for less than the entire amount, the failure of any one surety to pay his share would leave a larger burden upon the other sureties than they should, in equity, be compelled to bear. For example, if the entire default amounted to \$500.00 only, each surety should, in equity, pay \$125.00 thereof. Should all but one fail to pay their shares, the obligation of the full \$500.00 would fall upon one surety.

But the case at bar does not fall within either of these two classes, because there is a limitation of liability by contract, and the nonpayment of the portion of loss covered by the bond of any other company does not affect such liability.

We conclude then that, each of the companies being liable for a fractional part only of the entire loss and none of them being entitled to any contribution from the others, there being no common burden, the circuit court erred in holding that the several bonding companies, including The Fidelity & Deposit Company of Maryland on its \$54,000 bond, were co-sureties, and it follows that the unsecured bonding companies are not entitled to share in the collateral held by the two secured

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companies, for, as expressed by counsel, the sharing of indemnity is merely another method of enforcing contribution or making each pay ratably on the loss based on the same rule of equity that equality is equity—from such rights the sureties have divorced themselves by contract.

The circuit court found that there was due from The Assets Realization Company, plaintiff in error, in pursuance of its contract of purchase, to the several surety companies holding an assignment of the claim of the city of Cleveland, the sum of \$57,068.02, with interest from June 11, 1909, and judgment was rendered against plaintiff in error in favor of each of the said surety companies in proportion to the amount of their respective bonds.

In arriving at this amount, the court found the claim of the city of Cleveland, as allowed, to be \$153,336.04, a fifty per cent. dividend thereon amounting to \$76,668.02; the funds in the hands of the assignee, The Cleveland Trust Company, on the 11th day of June, 1909, was \$19,600—the difference between these two amounts being the amount ordered to be paid.

Plaintiff in error excepts to this order, and one of its contentions is that the collateral in the hands of the National Surety Company and The Fidelity & Deposit Company of Maryland should be applied to the claim of the city assigned to the surety companies in reduction of this claim and before the computation of dividends thereon. In support of this contention, our attention is called to the rule announced by this court in the case of *State National Bank v. Esterly*, 69 Ohio St., 24.

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At the time of the failure of the depository, The Euclid Avenue Trust Company, there were in the hands of the city of Cleveland certain securities, a part of the original \$75,000 of securities, which were reduced to money, the proceeds of which amounted to \$21,025.95, and the same were properly applied in reduction of the city's claim before presentation to the assignee for allowance—this in accordance with the rule announced in the Esterly case.

The other collateral which the plaintiff in error would have applied in reduction of the city's claim was not in the hands of the city, but was held by the two secured companies. The city, as we view it, had the right to present its claim to the assignee for allowance and could have collected from the assignee all dividends thereon before taking any step to enforce its claim on the several bonds, and we do not think that the rule in the Esterly case is applicable to the collateral in question, and the circuit court was correct in making the order for the payment of a dividend on the amount of the claim of the city, as allowed, without applying the collateral in the hands of the two companies in reduction thereof.

No question is or can be raised to the jurisdiction of the circuit court to determine the rights of the various parties interested in the collateral held by the two companies, but plaintiff in error does challenge the right of that court to fix the amount payable by it on the claim of the city. This, it contends, should be determined by the court of insolvency. It suggests that the decision of the circuit court, as to the distribution and ap-

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plication of the collateral, would, no doubt, control the court of insolvency in its orders as to the payment of dividends on the city's claim, but it submits that it is important that the insolvency court retain its jurisdiction for the reason, it urges, that, if it does, the proper order as to the application of the collaterals and the payment of dividends would be maintained.

We do not think there is any merit in this contention and it cannot be adopted. Under its contract of purchase, plaintiff in error agreed to pay to the assignee of the depositary an amount sufficient to pay a dividend of fifty per cent. on the face amount of all allowed claims, and this, in effect, was an obligation to pay the assignee, for and on behalf of the bonding companies, the holders of the allowed claim of the city, and the other general creditors—the contract was one for the benefit of these parties—and the bonding companies, as such beneficiaries, were in position to enforce their rights under this contract in this action, and this relief is sought by them in their pleadings. The cases cited by counsel—*Touche v. Metropolitan Ry., etc., Co.*, L. R., 6 Ch., 671; *Gandy v. Gandy*, 30 Ch. Div., 57; *Houghton v. Milburn*, 54 Wis., 554, and *Rothwell v. Skinker*, 84 Mo. App., 169—seem to be authority for the rule which would give to beneficiaries, under a contract like the one in the case at bar, the right to recover thereunder.

Plaintiff in error was made a party defendant in the common pleas court, and filed its answer and cross-petition setting up its interests and

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praying for general relief, and was a party to the appeal taken to the circuit court.

All the parties having an interest in the subject-matter were before the court, and, the court of insolvency having approved the contract of purchase, the circuit court had jurisdiction to make the order it did make against plaintiff in error and there is no reason, in our opinion, for remanding the case to the court of insolvency.

After applying the proceeds of the collateral held by the two secured companies in full indemnification of the loss sustained by them on their bonds, there will be an excess, and we are called upon to decide as to the disposition to be made of the same.

In arriving at a solution of this matter, it is important to keep in mind the proviso in the eight original bonds and in the \$54,000 substitution bond of The Fidelity & Deposit Company of Maryland. The bonds are identical in form, differing only in the name of the company, the penalty and the date. The proviso in the bond of the American Bonding Company of Baltimore is as follows;

“Provided, however, and upon the following express conditions: First, That in the event of default on the part of the Principal herein, the surety shall only be liable hereunder for such proportion of the total loss thereby sustained by the obligee as the penalty of this bond shall bear to the total amount of bonds, namely, Three Hundred Thousand Dollars (\$300,000), which said principal shall or should furnish in accordance with the provisions of the depositary ordinance of the city of

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Cleveland; and provided that the Surety shall not, in any event, be liable for an amount in excess of fifteen thousand dollars. Second, * * *."

The suretyship of each company was a separate transaction. Each obligated itself to pay a fixed proportion of the loss. In these bonds reference is had to the fact that the city of Cleveland awarded The Euclid Avenue Trust Company the custody of a certain portion of the public money, not to exceed \$250,000, subject to the provisions and requirements of law and the depositary ordinance of the city of Cleveland. This ordinance required the tendering of a good and sufficient bond, issued by a surety company, or the furnishing of good and sufficient security in the aggregate sum of not less than twenty per cent. in excess of this \$250,000, and it was to be presumed that the depositary would furnish bonds or securities, or both, aggregating in amount the sum of \$300,000. It was wholly immaterial, so far as the several companies executing the bonds were concerned, whether the balance of the \$300,000 would consist of securities, or additional bonds, and none of these companies had reason for complaint whatever plan the depositary might see fit to adopt.

As it happened, it placed in the hands of the city of Cleveland \$75,000 in securities. These securities were not placed there irrevocably set apart for the payment of the debt owing to the city. They did not constitute a "trust fund." Under the provisions of the contract entered into between the city and the depositary, the latter had the right to withdraw them and substitute in their place other securities, or to furnish bonds therefor.

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The depositary, exercising its right under this contract, withdrew from the custody of the city of Cleveland \$54,000 of securities and substituted in their place the \$54,000 bond of The Fidelity & Deposit Company of Maryland. This bond was accepted by the city and the city released all claim to the securities withdrawn. The depositary repossessed itself of these securities, converted the same into money and made a loan to The Avenue Apartment Company, secured by mortgage on its property. The city had no claim to or interest in this mortgage—the depositary had full dominion over it. It placed it, as it had a right to do, in the hands of The Fidelity & Deposit Company of Maryland to indemnify it against any loss it might sustain on its \$54,000 bond.

Counsel for plaintiffs below correctly state what was done in this connection and the effect thereof:

“It is incorrect to state that the municipal bonds deposited with the city were set aside by The Euclid Avenue Trust Company for the payment of its debt to the city. No property of The Euclid Avenue Trust Company was ever at any time irrevocably dedicated to the payment of this debt. But by the very terms of its contract with the city, it had the right to take down the property deposited with the city and put up in its stead a personal surety bond. It had the further right to do whatsoever it pleased with the municipal bonds which were for some time in the possession of the city. It did exercise its right to withdraw the bonds from the custody of the city, and in the exercise of its plenary power over those bonds it had the same sold and the proceeds thereof indirectly transferred

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to The Fidelity & Deposit Company to indemnify that company against loss on its fifty-four thousand dollar bond. * * * The agreement by which the municipal bonds were originally deposited with the city provided that The Euclid Avenue Trust Company should have the right at any time to take down those bonds and substitute in its [their] place a surety bond, and it certainly seems reasonable to suggest that the rights which the various surety companies had in the municipal bonds deposited as collateral were such only as the city had, and that the city having granted to the depository the right to substitute a surety bond, the other surety companies could not object thereto."

Counsel for the National Surety Company, one of the secured companies fully indemnified under our ruling as to its collateral, and not being personally interested in the disposition of the surplus, suggest that, after that company and the other secured company are fully indemnified, the other bonding companies, under the doctrine of subrogation through the rights of a creditor, would be entitled to have such surplus or excess applied in reduction of the principal's debt.

We recognize the rule that if a surety holds property of the principal as indemnity against loss by reason of his suretyship, the creditor may resort to such property and subject it to the payment of his debt, but a creditor can have no greater right in the property than the surety himself.

In Childs' Suretyship and Guaranty, at page 276, it is laid down as a rule that a creditor is entitled to the benefit of any security given by the principal to the surety for the indemnity of the latter as to

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the particular debt. In referring to this right, the author, on page 289, says: "We have been discussing, thus far, the right of a surety to be subrogated to the rights of the creditor. The creditor, after his claim is due, has a right of subrogation to securities held by the surety, provided they have been given to the surety by the principal. * * * It is essential that the security be given for the identical indebtedness due; and the creditor cannot obtain any greater rights than those possessed by the surety."

As we understand the rule then, the creditor, at most, is entitled to such benefit in the securities as the surety to whom the same are given would have. What is the result when the rule is applied to the collateral in the case at bar? The city of Cleveland, the creditor, if the two surety companies had not responded to their liability on their bonds, could have asserted in the collateral held by these two companies the same rights as could have been asserted by the companies themselves, and no more.

This collateral was placed by the depository in the hands of these two companies, impressed with a pledge to the extent that the same might be required to indemnify them against loss under the liability on their bonds. Had the two surety companies not paid their proportion of the loss to the city, it would have had the right to resort to this collateral to that extent only, but the two companies did pay to the city all they obligated themselves to pay, and are entitled to so much of the collateral as may be required to indemnify them. This is the full measure of the rights of the holders

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of this collateral, and when they exercise this right and apply the collateral to the extent that the same may be required to indemnify them, they have no further rights, of any kind or description, in the excess, and it follows that there are no rights to which subrogation can be had, either on the part of the city or the other bonding companies which paid their proportion of the debt. This collateral then having answered the purpose for which it was pledged, any surplus or excess would be the property of the pledgor—the depositary.

The plaintiff in error, The Assets Realization Company, having purchased all the property of the depositary, would, therefore, be entitled to this surplus.

The two secured surety companies, the National Surety Company and The Fidelity & Deposit Company, on its \$54,000 bond, are to be indemnified out of the collateral held by them, and there will be no loss to them on account of their suretyship. There was due from The Assets Realization Company, on account of the claim of the city of Cleveland, an amount sufficient for a dividend of fifty per cent. The unsecured companies alone, we think, are entitled to the benefit of this dividend of fifty per cent. on the face amount of the claim of the city of Cleveland, for the reason that they, having incurred a loss on account of their bonds growing out of the indebtedness, are entitled to avail themselves of all the rights the city had in this dividend.

It appears from the record, that there was paid to the National Surety Company on account of the amount paid by it to the city, the sum of \$1,484.71,

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out of the \$19,600 in the hands of the assignee at the time of the purchase of the assets by The Assets Realization Company. The Fidelity & Deposit Company was paid no part of this \$19,600 on account of the amount paid by it to the city upon its \$54,000 bond, but the sum of \$4,007.59 was retained by the assignee for that purpose.

We are of the opinion that the amount received by the National Surety Company and the amount retained by the assignee, as well as the sum of \$57,068.02, and interest, the amount ordered to be paid by The Assets Realization Company, should be paid to the unsecured companies, including The Fidelity & Deposit Company of Maryland on its \$25,000 bond, in proportion to the amount of their respective bonds.

The circuit court ordered the receiver appointed by it to sell the collateral and out of the proceeds to pay, first, the costs of the action, including a fee to counsel for plaintiffs below for services "rendered herein in behalf of all surety companies."

It is not disclosed by the record just what services were intended to be covered by this allowance, and we are not advised upon what theory the circuit court acted. Counsel to whom this allowance was made presume that the order was premised upon the conclusions at which the circuit court had arrived with respect to the rights of the parties already determined by that court. They say that the two secured companies did wrong in withholding its collateral from those properly entitled to its benefit, and to right this wrong the plaintiffs below began the action for the benefit

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of all parties in interest, prosecuted the suit to a successful conclusion through two courts and procured the benefit of the collateral, not simply for themselves, but for all others as well. This reason, if it were a reason, for an allowance does not exist under our ruling as to the collateral held by the two secured companies, and, no benefit having been derived therefrom through the efforts of counsel, an allowance of a counsel fee would be improper upon that theory.

If their claim is based, in part, upon the judgment obtained against The Assets Realization Company, we can see no reason for making the allowance on that account, because all the companies employed their own counsel and sought this same relief, and it cannot be said that this judgment was obtained entirely through the efforts of counsel for plaintiffs below, and there is no reason, as we see it, why the other companies should be compelled to contribute to the fee of counsel for plaintiffs.

We conclude then that the judgment of the circuit court should be modified in accordance with the views herein expressed, and it will be so ordered.

Judgment modified.

JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

Syllabus.

ENSEL *v.* LUMBER INSURANCE COMPANY OF
NEW YORK ET AL.

Fire insurance policy—Time when effective—Question for jury, when—Subject of insurance sufficiently described, when—Failure by insured to mention facts—Constitutes concealment and avoids policy, when—Subrogation clause in policy—In favor of insurer in case of fire—Construed against insurer, when—Fee simple ownership clause in policy—Does not apply to lumber in building, when—Chattel mortgage incumbrance clause—Does not apply, when.

1. An insurance agent negotiated for the plaintiff, through the underwriters of an insurance company, a policy in that company. A few months later the underwriters notified the agent that the company would cancel the policy. The agent assented for the plaintiff, but said he would take the usual five days to obtain other insurance. Thereupon the underwriters offered to rewrite the insurance in the defendant company. The plaintiff, through the agent, assented, and a new policy was delivered the same day at two o'clock. The fire occurred at six o'clock.

Held: The court properly submitted to the jury the question as to the time the contract of insurance went into effect, and the finding of the jury that it went into effect at the time of delivery and was not postponed until five days later, is not contrary to law.

2. The subject of the insurance was described in these words: "On his interest in the lumber in Wabash Elevator No. 4, while on the premises, situated on Middle Ground near the Maumee river, Toledo. It is understood that the building is in process of demolition and said insurance is to cover above-described lumber while on the premises."

Held: This advised the underwriters of the nature and extent of his interest as an element of the risk.

3. Plaintiff's interest was acquired from the Wabash Railroad Company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it. The underwriters thoroughly inspected the risk on the premises before they wrote the policy. They did not inquire for the contract nor ask the plaintiff any questions, and he made no statement about it. A clause in the policy avoids it, "if the insured conceals any material fact concerning the insurance or any subject thereof."

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Held: It was for the court to say whether his failure to mention the release was a material concealment within the terms of the policy.

4. Another clause of the policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation, the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured."

Held: A stipulation such as the latter can only be used to work a forfeiture *strictissimi juris*. That clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy.

5. Another clause avoids the policy, "if the subject of the insurance be a building on ground not owned by the assured in fee simple." The building was upon the ground described in the policy, but the fee simple title to the land was not in the plaintiff.

Held: The property insured was not part of the real estate but lumber in a building in process of demolition. Therefore this clause of the policy has no application to this case.

6. It also provided that: "If the subject of the insurance be or become incumbered by a chattel mortgage the policy shall be void." There was a railroad mortgage by the Wabash company undischarged at the time it sold the lumber in the building to the plaintiff. That mortgage contained the usual proviso that the railroad company might dispose of equipment and material, replacing the same with new, and the company was doing that thing.

Held: The mortgage lien upon this lumber was discharged. For this and other reasons this defense was properly excluded.

(No. 13194—Decided June 27, 1913.)

ERROR to the Circuit Court of Lucas county.

The plaintiff held a policy of insurance in The Teutonia Fire Insurance Company for \$1,000 upon his interest in a frame building known as Wabash Elevator No. 4, in Toledo. By contract

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in writing he had purchased the material and lumber in the building from the Wabash Railroad Company for \$2,000 and agreed to demolish the building. There was a stipulation in the contract that the railroad company was released from all liability on account of fire, from negligence or otherwise, while the building was being demolished. The plaintiff obtained the insurance from a Mr. Smith, an insurance agent, who negotiated the policy through The Welles-Bowen Company, agents of the Teutonia company.

Before writing the policy, Mr. Bowen of that firm, with Mr. Smith, made a thorough inspection of the risk. About six months later, on June 24, 1910, Mr. Welles of that firm notified Smith that the Teutonia company wished to cancel the policy, and he offered to rewrite the insurance in the defendant company. Smith communicated with the plaintiff Ensel by telephone, who assented to the change and said he would return the Teutonia policy.

Thereupon Smith told Welles to rewrite the insurance in the Lumber Insurance Company, which he did and delivered the new policy to Smith about two o'clock the same day. Proper entries of the transaction were made in The Welles-Bowen Company's books and the defendant company was notified of the issuance of the policy. About one-fourth of the building was reduced to lumber by that date; and at six o'clock the building took fire and was consumed.

Attached to the face of the policy of the Lumber Insurance Company was a typewritten memorandum, called a "rider," as follows:

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"E. L. Ensel. \$1,000 on his interest in the lumber in Wabash Elevator No. 4, and, or while on the premises situated on Middle Ground near Maumee River, Toledo, Lucas County, Ohio. It is understood and agreed that the building is in process of demolition and said insurance is to cover above described lumber while on the above described premises, within 1,000' ft. of building."

The printed policy contained the following clauses:

1. "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof."

2. "This entire policy unless otherwise provided by agreement, endorsed hereon or added hereto, shall be void * * * if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of the insurance be personal property and be or become incumbered by a chattel mortgage."

3. "If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment."

The record discloses that the Wabash company and other companies operated steam railroads in the immediate vicinity of the elevator; that the cause of the fire was unknown; that Ensel had never shown his contract with the Wabash Rail-

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road Company and that no one had ever asked him for it.

The loss was much more than the insurance. Proofs of loss were filed with the company, which declined to pay, and this suit was commenced.

The defendant sets up four defenses: First, a general denial; second, the building was on ground not owned by the plaintiff; third, part of the property was encumbered by a mortgage given by the Wabash railroad to The Bowling Green Trust Company; fourth, the subrogation clause; that plaintiff by his contract with the Wabash company released that company, which fact he had not disclosed to defendant.

Plaintiff in reply admitted the provisions of the policy; that the building was not on ground owned in fee simple; but alleged defendant knew that fact and waived that provision and the provision in regard to chattel mortgage, by the rider; and that defendant had full opportunity to know all of the provisions of the contract with the Wabash railroad; and denied any concealment of a material fact.

At the close of plaintiff's case, defendant made a motion for a directed verdict, which was renewed at the close of all the testimony and was overruled. Thereupon the defendant requested that the case go to the jury on all the issues, which was refused. The court submitted the first defense, holding the others were not separate defenses. The jury returned a verdict for the plaintiff; a motion for new trial was overruled, and judgment entered. Defendant prosecuted error. The circuit court found the com-

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mon pleas should have directed a verdict for defendant, and entered judgment accordingly. The plaintiff now prosecutes error to this court.

Mr. Ralph S. Holbrook and Mr. Claude R. Banker, for plaintiff in error.

Messrs. Brown, Hahn, Sanger & Froelich and Messrs. King, Tracy, Chapman & Welles, for defendants in error.

WILKIN, J. The counsel for defendant lay down four propositions to support the judgment of the circuit court: 1. The policy never went into effect. 2. The minds of the parties never met upon the subject-matter of the contract of insurance. 3. Part of the property was personalty encumbered by a chattel mortgage, contrary to the provisions of the policy. 4. Part was a building situate on ground not owned in fee simple, contrary to the provisions of the policy.

The evidential facts connected with the negotiation of the insurance are not in dispute. But there is a dispute about the ultimate facts which may be deduced from the proven facts: 1. Are they mere inferences which the judge may draw? 2. Are they legal presumptions which the law makes? 3. What conclusion of law arises from the ultimate facts thus determined?

As is usual in insurance cases, we are confronted with a mass of diverse decisions and doctrines. We would have to write a treatise if we attempted to untangle the confusion and conflict of law presented in the briefs. We have not the time, if we had the inclination, to attempt to harmonize the cases. We shall dispose of this case upon its

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own intrinsic facts and the legal principles which we deem safe guides to its solution. To that end we shall consider the defendant's four propositions briefly.

First. Did the policy not go into effect? This is based on the fact that when Welles notified Smith that the Teutonia company would cancel its policy, Smith answered that he would accept the notice and take the usual five days to obtain other insurance. If the colloquy had ended there, the Teutonia policy would have been current when the fire occurred some hours later. But the dialogue continued. Welles: "I can rewrite the policy in the Hudson's Underwriters" (Lumber Insurance Company). Smith, after consulting Ensel: "Go ahead, rewrite the policy and deliver it this afternoon." That was done, and the fire occurred four hours later. Counsel for defendant say: "They wished to substitute one policy for another, but intended the new policy should come into force four days later." We think otherwise; the exchange was complete when the new policy was delivered that afternoon at 2 o'clock. The jury so found by their verdict, and the circuit court erred if it meant to reverse that finding.

Second. Did the minds of the parties meet upon the subject-matter of the insurance? Counsel for defendant say the subject-matter is the risk of loss by fire which the underwriter agrees to take. He quotes Richards on Insurance, page 118: "And if, at the time of closing the contract, the one party has knowledge of facts material to the risk which, with or without design, he fails to disclose to the other party, then the parties are not contracting

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with reference to the same chance. There is no meeting of the minds upon the same essential subject-matter of their contract." The author supports that text by an extract from Lord Mansfield's decision in the leading case of *Carter v. Boehm*, 3 Burr., 1905: "The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and induce him to estimate the risk as if it [the circumstance] did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void."

The circumstance alleged to have been withheld is the clause in Ensel's bill of sale from the Wabash company releasing the company "from all liability on account of fire to said elevator while being wrecked." Was this release a material element of the risk about which the parties were negotiating when they arranged to exchange the Teutonia for the Hudson's Underwriters policy? If it became material at all, it did so only as a feature, not of the risk but of the contract; for if it became an element of the contract of indemnity it did so not as affecting the risk but only as affecting the contract of subrogation. That is to say, the policy contained two contracts: One to indemnify Ensel for loss by fire, the other to subrogate the company to any right he might have against anybody else to recover for the same loss by fire "from negligence or otherwise."

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Now, it is not contended by the defendant that these obligations were reciprocal in the sense that the breach of the latter discharged the former, nor that Ensel actually agreed to confer upon the defendant the right of subrogation. The defendant's claim is quite different from either of these. It is that there being a subrogation clause in the printed stipulations, the plaintiff assented to it when he or his agent accepted the policy, because the law presumes that he read it.

The next step in the argument is, that the law presumes, when he thus adopted that clause, he represented that he still had all rights of recovery from everybody who should by negligence or otherwise set fire to the building.

The third step is, that there was another stipulation preceding the subrogation clause, viz: "This policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof;" therefore he deceived the insurance company, because he did not, between the delivery of the policy to Smith at 2 o'clock and the fire at 6 o'clock, reveal to the company that he had released his right of recovery for negligent fire by the Wabash company. All the while it is conceded Ensel did not see the policy nor know of these stipulations, and he was asked no questions, and made no statements about anything.

Here we have a presumption upon a presumption, one of which cannot be true without the other is presumed to be true, from which to deduce the conclusion of deception—a conclusion deceptive

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surely enough. Formal logic may not be of much value as a constructive science, but it has legitimate use for criticism; it will expose error and puncture a fine fallacy. Let us syllogize defendant's argument:

Whoever knows and does *not* speak, lies.

The law assumes that E. knew and that E. *did* speak.

Therefore E. lied.

But this lame conclusion would not avail defendant, if it were sound. The defendant must proceed further. For, let us note, the defense stated in the answer is not what defendant's counsel misconstrues it to be in the argument. It seeks to avoid the contract for fraud. The defense is deceit, not want of mutuality. He must show not only that the represented fact was not true, but that the presumed misrepresentation was made for the purpose of deceiving the defendant; and that the defendant relied upon the representation as true. Does the law presume that Ensel did what he did not in fact, and then presume that what he did not in fact he did for an evil purpose? Are we to have a third presumption, grounded upon the second, which was grounded on the first? This argument on presumptions is strained and artificial and does not win our confidence.

And still this defense would not be complete. The insurance company was not deceived if its agent Bowen made a thorough inspection of the risk and inquired how much interest Ensel had in this building. Did he see the Wabash company's copy of the contract with Ensel when he went

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down to the elevator to investigate the risk? The nature and extent of Ensel's interest was determined by that contract, and "his interest" was, by the very language of the "rider," a very material element of the risk. If Ensel's interest was the perfect and complete ownership of the structure which he was to demolish, then he had all the right of recovery from the Wabash company or anybody who caused its destruction by negligent fire or otherwise. If the company's agents did not examine this phase of the risk, can the company complain now?

Counsel for the company allow no presumption that the company knew what it might have known; and justly, we think, because it is a question of construction and inference, whether he affirmed the fact by silence, or whether under all the circumstances the company was under duty to inquire. But counsel also concede no ground for inference. We think there was ground for inference, and that the trial judge properly decided the question. If the circuit court ruled the question otherwise, it must have done so because there was no evidence that the company assumed the risk upon its own knowledge; ignoring the clear, uncontroverted testimony that Bowen "made a thorough inspection of the risk in detail."

On this question of knowledge, we are cited to the case of *Nelson v. Continental Insurance Co.*, 182 Fed. Rep., 783. That company had issued to Nelson a policy against fire to his "five-story building, situate Nos. 138-142 E-S of North Market St." The policy had a "rider," to-wit: "this insurance also covers the assured's one-half

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interest in the south wall of the *four-story* * * * building, situate Nos. 144-146 North Market St." The court said: "The rider indicates that the insurer had knowledge that the south wall of the Pilcher building was a party-wall, outside of and beyond the limits of the premises generally described in the policy, which were the *assured's* 'five-story * * * building, situate Nos. 138-142 E-S of North Market street * * *,' while the rider extends the protection of the insurance to the assured's *interest* in the south wall of the building described as 'situate Nos. 144-146 North Market St. * * *.' *Under these circumstances* defendant must be *presumed* to have had knowledge of plaintiff's interest in the *subject* of the insurance, and to have issued its policy with such knowledge."

Counsel for defendant here criticise the case, but reluctantly admit that the federal court rightly raised the presumption under the circumstances of that case. Counsel can hardly consistently contend that the trial court went wrong in drawing an *inference* of the same sort under the circumstances of the case at bar.

Furthermore, there may be a question whether, in the light of all the circumstances, the stipulation as to the subrogation was in fact violated. It runs in the future. "If this company *shall* claim that the fire was caused by the act or neglect of any person or corporation * * * this company *shall* be subrogated to all right of recovery by the insured * * * and such right *shall* be assigned to this company." That the Wabash company caused the fire, does not appear. If that fact shall

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subsequently appear, the defendant may assert it in an action for breach of this covenant. "Sufficient unto the day is the evil thereof."

This stipulation is used in this action to work a forfeiture. The law abhors a forfeiture, and will countenance it only *strictissimi juris*. Besides, the stipulation, being written in the policy by the insurer for the protection of the insurer, is to be interpreted most strongly against the insurer. Here the insurer seeks to construe it as implying, nay, as importing by *presumption of law*, a representation that the insured had a right of recovery against the Wabash company. The representation can hardly be imported into the document by strict construction. The most the defendant could claim is a mere *inference* that the plaintiff represented that he had the right to sue the Wabash company if that company should negligently or otherwise set fire to the property, and that he so represented falsely and purposely. That was an inference for the trial judge, if he found the facts would justify it. The judge did not so find. We think he was right; he properly construed the contract.

Third. The property was incumbered by an undischarged mortgage upon the Wabash railroad. What we have said *supra* about notice of and inquiry into the extent of his interest, applies to this defense. Insurance is often written, "upon the assured's interest as his interest may appear." The "rider" is not materially different in effect. It was notice that his ownership of the building was not perfect, absolute ownership.

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The mortgage does not appear in the record, but we glean that there was the usual proviso that the railroad company might dispose of equipment and material, replacing the same with new. For aught that appears this is what the railroad company was doing. If so, the lien upon this lumber was discharged. This defense is not valid.

Fourth. The elevator was situate on ground not owned by the plaintiff in fee. The property insured was not the *building*, but the lumber contemplated as personalty, though part of a structure "in process of demolition." The property was upon the land where it was described to be. The fact that the fee simple title to the land was not in the owner of the personalty insured, is not material.

The error of counsel throughout this case, lies in a confusion of terms. They mistake inference for presumption—a slip too often unconsciously made by judges as well as lawyers. A presumption is a rule which the law makes upon a given state of facts; an inference is a conclusion which, by means of data founded upon common experience, natural reason draws from facts which are proven.

A presumption of law may be *prima facie* only—that is, a hypothesis which will admit of proof to the contrary; or it may be absolute—that is, a postulate which, for reasons of legal policy, the law will not permit to be contradicted. The latter may be a mere fiction, assumed to be true, although the known fact may be the very opposite.

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It is the latter sort which we are urged to adopt in this case. There may be cases, having somewhat similar features, where judgment upon presumptions may be legitimate. This is not one of them.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

THE CITY OF CINCINNATI ET AL. v. THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

Appropriation of public property for easement—Section 6420, Revised Statutes, applies to proceedings under Section 3283a, Revised Statutes (99 O. L., 590)—Board of directors of railroad—Has primary discretion to determine necessity therefor—But court has final authority to determine necessity for appropriation.

1. Section 6420, Revised Statutes, is a part of title II, chapter 8, part 3, Revised Statutes, applicable to proceedings brought under favor of Section 3283a to appropriate an easement over public ground lying within the limits of any municipality and dedicated to the public for use as a public ground, common, landing, wharf, or any other public purpose, excepting streets, avenues, alleys or public roads.
2. Section 6420, Revised Statutes, authorizes the court in which such proceeding is properly brought to hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner and the necessity for the appropriation, before proceeding to impanel a jury to assess compensation.
3. The board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the state of Ohio has primary discretion to determine the necessity

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for the appropriation contemplated under the provisions of Section 3283a, Revised Statutes, but under the provisions of Section 6420, Revised Statutes, the court in which such proceeding is properly brought has the final authority to hear and judicially determine the existence of the corporation, its right to make the appropriation, its inability to agree with the owner and the necessity for the appropriation and power to determine whether the proposed appropriation will be an abuse of its corporate power or destructive of the public purpose to which the land is already devoted. (*Wheeling & Lake Erie Rd. Co. v. Toledo Ry. & Term. Co.*, 72 Ohio St., 368, followed and approved.)

(No. 13887—Decided June 27, 1913.)

ERROR to the Circuit Court of Hamilton county.

On the 21st day of January, 1910, The Louisville & Nashville Railroad Company filed a petition in the court of insolvency of Hamilton county asking that a jury be impaneled to make an inquiry and assessment of the compensation for an easement sought to be appropriated by it in certain lands situated in the city of Cincinnati dedicated to public use. This land was dedicated by the original proprietors of the town of Cincinnati. A plat was filed and recorded laying off the proposed town of Cincinnati into lots abutting on streets running in general parallel with and at right angles to the Ohio river. A space extending from the east boundaries of the proposed town to the west line of Main street and from the north side of Front street to the river was not subdivided into lots.

Sometime after this plat was filed and recorded Joel Williams purchased of the original proprietors their easement and interest in the town, subdivided this open space into lots which he under-

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took to sell and also erected a building on a part of these premises. The town of Cincinnati brought a suit against him to quiet its title to this open space as a public common and in that case the court held that this land had been dedicated to the town of Cincinnati as a common for the uses and purposes of the inhabitants of Cincinnati forever, but did reserve to Joel Williams and his heirs the exclusive right of a ferry opposite said premises and also a landing place for the purposes of such ferry; also reserving to the said Williams and his heirs the use of a brick house erected by him on said premises, together with a portion of the land for a term of eight years next after the first day of April following the date of such decree; and entered a judgment in said cause enjoining the said Williams from erecting any further buildings, fences, or nuisances upon any part of the premises, and ordering and adjudging that the town of Cincinnati stand seized of said premises in fee simple to the use of the inhabitants of said town for a common forever. That judgment is still in full force and effect.

To this proceeding to appropriate an easement across these premises the city of Cincinnati, The Covington & Cincinnati Bridge Company, and the heirs of Joel Williams were made party defendants.

On the preliminary hearing in the court of insolvency, that court found that plaintiff is a corporation duly organized under the laws of the state of Kentucky and that it owns and operates a railroad partly within the state of Ohio; that the board of directors of the plaintiff company, by

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resolution duly passed, declared it necessary to make the appropriation sought to be made, and that plaintiff duly submitted to the council of the city of Cincinnati general plans of the structure proposed to be built on and over the property sought to be appropriated; that the council of the city of Cincinnati agreed upon the manner, terms and conditions upon which said property might be used and occupied by plaintiff and approved the plans by ordinance duly passed; that plaintiff within sixty days after the passage of said ordinance filed its written acceptance thereof; that the plaintiff had been unable to agree with the owners as to the compensation to be paid them severally for their interests in the land sought to be appropriated; and further found that the plaintiff is without right to make the appropriation and that there is no necessity for the appropriation sought to be made, and thereupon dismissed plaintiff's petition at its costs.

Error was prosecuted in the common pleas court of Hamilton county and that court affirmed the judgment of the court of insolvency. The circuit court of Hamilton county, however, reversed the judgment of the court of insolvency and the judgment of the common pleas court affirming the same and remanded the cause to the court of insolvency for further hearing and trial according to law, and this proceeding in error is now prosecuted to reverse the judgment of the circuit court.

Some years before the filing of this petition in the court of insolvency to appropriate an easement in this property, the city council of the city of Cincinnati passed an ordinance agreeing upon

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the manner, terms and conditions upon which The Louisville & Nashville Railroad Company might use, occupy and cross over, along and upon the streets, alleys and public grounds of the city of Cincinnati for the purpose of constructing, maintaining and operating the extension of its steam railroad. Immediately after the passage of this ordinance, the city solicitor of Cincinnati brought an action to enjoin the railroad company from using and occupying this property under the provisions and terms of said ordinance; and this court affirmed a judgment in that case granting a perpetual injunction against The Louisville & Nashville Railroad Company.

Following that decision of this court, the general assembly of Ohio passed a law amending Section 3283, Revised Statutes of Ohio, and supplementing the same by Section 3283*a*. Section 3283 is now Sections 8763, 8764, 8765 and 8766 of the General Code. Section 3283*a* is now Sections 8767, 8768 and 8769 of the General Code. Subsequent to the amendment of Section 3283 and the enactment of Section 3283*a*, and in pursuance of the authority granted by these sections, The Louisville & Nashville Railroad Company began this proceeding in the court of insolvency.

Shortly after filing the petition in this case, an injunction proceeding was brought to restrain the railroad company from the construction of its viaduct and from further prosecuting its action to appropriate an easement in this property, upon the theory that these acts are unconstitutional.

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The common pleas court, however, held the act constitutional and the ordinance passed by the city of Cincinnati thereunder a valid ordinance, and that judgment was affirmed by the circuit court, and the judgment of the circuit court was affirmed by this court (82 Ohio St., 466). Error was then prosecuted by the city in that case to the supreme court of the United States, and that court affirmed the judgment of the state courts (*City of Cincinnati v. Louisville & Nashville R. R. Co.*, 223 U. S., 390).

Mr. Alfred Bettman, city solicitor; *Mr. Albert Bettinger*; *Mr. Walter Schmitt* and *Messrs. Hosea & Knight*, for plaintiffs in error.

Mr. Ellis G. Kinkead; *Mr. H. Kenneth Rogers*; *Mr. H. L. Stone* and *Mr. J. B. Foraker*, for defendant in error.

DONAHUE, J. The principal question arising in this case involves the construction of Section 3283a, Revised Statutes of Ohio (99 O. L., 590). This court, in a former action between the City of Cincinnati and The Louisville & Nashville Railroad Company, 82 Ohio St., 466, held this section constitutional. It provides, among other things, that proceedings to appropriate an easement to use and occupy for an elevated track any portion of any public ground lying within the limits of a municipality and dedicated to the public for use as a public ground, common, landing or wharf, or for any other public purposes excepting streets, avenues, alleys or public roads, shall be conducted

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in the manner provided in title II, chapter 8, part 3, of the Revised Statutes, so far as the same may be applicable thereto.

Chapter 8, part 3, title II, relates to the appropriation of private property by corporations. Section 6420 is one of the sections of this chapter, and reads as follows: "On the day named in any summons first served, or publication first completed, the probate judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation. Upon these questions the burden of proof shall be upon the corporation, and any interested person shall be heard."

In pursuance to the provisions of Section 6420, this case came on to be heard in the insolvency court upon these four preliminary questions, and that court found that the plaintiff is a corporation, that it is unable to agree with the owner, that it had no right to make the appropriation, that there is no necessity for the appropriation, and dismissed the plaintiff's petition.

The common pleas court affirmed this judgment. The circuit court reversed this judgment of affirmance and also the judgment of the court of insolvency, upon the theory that that court had no authority to determine the necessity for the appropriation or the right to appropriate.

It is insisted on the part of the defendant in error in support of the judgment of the circuit court, that Section 3283a, Revised Statutes, authorizes the board of directors of any domestic or foreign corporation owning or operating a railroad wholly

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or partly within the state of Ohio to determine the necessity of such appropriation, that its judgment in that respect is final, that the court in appropriation proceedings under Section 3283a has no right or authority to hear and determine these questions, and that the necessity for the appropriation is solely within the discretion of the board of directors of the railroad company.

The language of this statute upon which counsel for defendant in error rely, is as follows: "If it be necessary in the judgment of the board of directors of any domestic or foreign corporation owning or operating a railroad wholly or partly within the State of Ohio to use and occupy for an elevated track any portion of any public ground * * * such company may appropriate an easement over so much of such ground as may be necessary for such purpose."

This language is not different from the language found in original Section 3283, Revised Statutes, which was before this court in *Village of Rockport v. C. C. C. & St. L. Ry. Co.*, 85 Ohio St., 73.

That section provided among other things: "and it be necessary in the judgment of the directors of such company to use and occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the appropriation of the property of individuals."

As already stated, title II, chapter 8, part 3, of the Revised Statutes, provides for the appropriation of the property of individuals, so that the statutes in this respect are identical. They are

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also alike in the fact that the board of directors of the railroad company must first determine the necessity of the appropriation before the commencement of the proceedings to appropriate.

It may also be observed in passing, that the language used in the original Section 3283, Revised Statutes, is now used in the General Code. The presumption is that the codifiers did not intend to change the meaning of this statute, and we do not think that they have changed the meaning by substituting the words, "in the manner and upon the same terms as is provided for the appropriation of the property of individuals," (Section 8767, General Code), for the words, "title II, chapter 8, part 3, of the Revised Statutes" (Section 3283a, Revised Statutes).

In the case of *Rockport v. Railroad Co.*, *supra*, the court of insolvency of Cuyahoga county heard these preliminary questions and determined among other things that "such appropriation is not necessary for the purposes of the plaintiff's railroad," and thereupon dismissed plaintiff's petition. The common pleas court affirmed the judgment of the court of insolvency. The circuit court reversed the judgment of the court of insolvency and the judgment of the court of common pleas affirming the same, and this court reversed the judgment of the circuit court and affirmed the judgment of the court of insolvency.

The effect of the judgment in that case is that the following language, found in Section 3283, Revised Statutes, "and it be necessary in the judgment of the directors of such company to use and occupy such road," did not confer

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upon the railroad company final authority to determine that question, but rather that under the provisions of this section a corporation has primary discretion in determining the necessity for the appropriation, but that under the provisions of Section 6420, Revised Statutes, the probate judge is expressly given jurisdiction to hear and determine this question, as well as the other questions mentioned in that section. To the same effect is *W. & L. E. Rd. Co. v. Toledo Ry. & Term. Co.*, 72 Ohio St., 368; *P. C. C. & St. L. Ry. Co. v. City of Greenville*, 69 Ohio St., 487.

We are content with the conclusions reached by this court in the cases above cited. We do not believe that the legislature intended to make the board of directors of a railroad corporation a court of last resort to determine the necessity of the appropriation of property already dedicated to a public use. If it had so intended, it would certainly have provided some means or method by which persons interested might be heard before their rights are forever foreclosed by the judgment of the board of directors of a private corporation, and probably would have provided for an appeal or error proceeding. When the legislature declared that the proceedings to appropriate must be in conformity to the appropriation proceedings provided in chapter 8, part 3 of title II, so far as the same may be applicable, it certainly had in mind the provisions of Section 6420 of that chapter, and there is no apparent reason why the provisions of that section are not applicable to this proceeding.

In this case, as in the Rockport case, the property sought to be appropriated for the elevated

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tracks of The Louisville & Nashville Company is property already dedicated to a public use, and before it can be appropriated to another public use which will materially interfere with the original use or be partly destructive of that use, it should be made to appear clearly that the same is necessary, and not destructive of the public use to which the land is already devoted, otherwise great injustice might be done to existing rights of the public without any real necessity therefor. As for instance, in this case it is claimed by counsel for plaintiff in error that the real purpose of the railroad company is to cripple, hinder and prevent river traffic, to the end that it may increase its own freight and passenger receipts, and that those in management of this company's affairs have shown an unfriendly disposition toward river navigation. Without in any way determining that this charge is true, the fact that it might be true, if not in this case, then in some other similar case, would show the absolute absurdity of committing to an unfriendly board of directors of a competing line of travel and transportation final authority to determine its own needs, to the destruction of a rival interest.

If the construction of this section contended for by counsel for The Louisville & Nashville Railroad Company were to obtain, then the section is clearly unconstitutional. Section 16 of Article I of our constitution provides that: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."

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If a question of such vital importance to the citizens of a municipality is to be adjudicated finally by the board of directors of a private corporation without any notice to persons or municipalities interested and without even a right of such persons or municipalities to appear before the board of directors, then not only the spirit but the letter of this provision of the constitution is violated, for in this way a most important public use may be entirely destroyed at the mere whim and caprice of the board of directors of a private corporation without any actual necessity therefor. It is therefore evident that this court, when it affirmed the judgment of the circuit court of Hamilton county holding this law constitutional, did not believe it subject to any such construction as here contended for, otherwise it must have held the law to be in violation of Section 16 of the Bill of Rights.

A consideration of the principles underlying the right sought to be asserted here could lead to no other conclusion. Eminent domain is the right of the sovereign to appropriate private property for public use upon paying to the owner a just compensation therefor to be ascertained according to the methods provided by law. In this state this right of eminent domain is vested in the state government, but the state may exercise this right through the medium of corporate bodies to whom it delegates the power to exercise it, but this right can be delegated only for public purposes, private property cannot be taken for private use without the consent of the owner. This appropriation is sought for public purposes only, otherwise there is no right to appropriate. The

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property, however, is already devoted to a public purpose. In 1789, when the town of Cincinnati was platted, the original proprietors dedicated this land as a common for the use and benefit of the town, forever reserving only the right to a ferry. In the dedication of this land to public use the proprietors had a right to designate the use to which it should be applied. It is now sought to subject this land to another public use which may interfere with or even be partly destructive of the use to which it was originally dedicated. It is clear that this can be done under the provisions of Section 3283a, Revised Statutes, but it is equally clear that it was not the intention or purpose of the legislature to give any larger rights or greater powers to the company seeking such appropriation than is given in other cases. It is the settled policy of this state to protect from unnecessary interference or destruction a public use already acquired in property, and we do not think that the legislature in enacting Section 3283a, Revised Statutes, intended to relax this rule or to abandon this wise public policy.

This court, in the case of *L. & N. Rd. Co. v. City of Cincinnati*, 76 Ohio St., 481, held that the city could grant no rights in this property to the railroad company, and further held that it was not even in the power of the legislature, unless in the exercise of the right of eminent domain, to authorize property dedicated to a public use for a specific purpose to be used for a purpose inconsistent with that to which it was dedicated. The effect of this holding is that without the aid of Section 3283a, the Louisville & Nashville railroad could

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not appropriate any easement in this land inconsistent with the use to which it was originally dedicated. To hold that the legislature in delegating this extraordinary power to private corporations also conferred authority upon these corporations to finally determine the existence of primary facts essentially prerequisite to the right to appropriate at all, would be in effect to hold that the legislature had abused the power and authority conferred upon it by the constitution of the state.

It is, however, the settled rule of construction in this state that all statutes granting to corporations the right of eminent domain, which is an attribute of sovereignty itself, must be strictly construed. *Currier v. Marietta & Cincinnati Rd. Co.*, 11 Ohio St., 228; *Atkinson v. M. & C. Rd. Co.*, 15 Ohio St., 21; *Platt v. Pennsylvania Co.*, 43 Ohio St., 228; *Ravenna v. Pennsylvania Co.*, 45 Ohio St., 118.

We have reached the conclusion that Section 6420, Revised Statutes, applies to proceedings to appropriate brought under favor of Section 3283a, Revised Statutes, and that the judge or court hearing said cause has the right and authority to determine every preliminary question incident to the exercise of the right of eminent domain.

Counsel have urged other assignments of error upon our attention, but the view we have taken of this question disposes of the case, and because of the fact that the other questions are peculiar to this case only and not of general importance, we have not considered it necessary to pass upon them at this time.

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The judgment of the circuit court is reversed, and the judgment of the court of insolvency of Hamilton county and that of the court of common pleas affirming the same are affirmed.

Reversed.

SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

AMES ET AL. v. McCAUGHEY, RECEIVER, ET AL.

Incorporators of corporation for profit—Liable for deficiency of ten per cent. of capital stock, when—Section 3244, Revised Statutes—Liability for debts created prior to incorporation.

A corporation for profit was duly created and organized under the laws of Ohio in 1906, and became indebted for personal property purchased for use in its proposed business. No part of the capital stock was paid into the treasury of the company.

Held: Under Section 3244, Revised Statutes, which was then in force, the incorporators are liable to the creditors of the company to the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock. (*Hessler v. The Cleveland Punch & Shear Works Co. et al.*, 61 Ohio St., 621, approved and followed.)

(No. 13136—Decided May 13, 1913.)

ERROR to the Circuit Court of Knox county.

The facts are stated in the opinion.

Messrs. Waight & Moore and Mr. H. C. Devin,
for plaintiffs in error.

Mr. John D. Snyder; Mr. Hiram Van Campen
and *Mr. D. B. Grubb*, for defendant in error.

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BY THE COURT. The Findlay Foundry & Machine Company recovered a judgment for \$2,037.34 against The Vernonview Glass Company at the May term, 1908, of the Knox common pleas. Subsequently William D. McCaughey was appointed and qualified as receiver of the Foundry & Machine Company, and, in December, 1908, brought suit against the Glass Company as an insolvent corporation and all of its stockholders who were discovered, among whom were the five original incorporators, to enforce payment of the amount remaining unpaid on his judgment, the suit being brought in behalf of the receiver and all other creditors. Judgment was rendered for plaintiff in the common pleas. On appeal to the circuit court a like judgment was rendered. This proceeding is brought to reverse the judgment of the circuit court.

The circuit court made a finding of facts from which it appears that the Glass Company was duly incorporated under the laws of Ohio, with an authorized capital stock of \$65,000, and that the defendants named were incorporators thereof; that four of the defendants had each subscribed for \$50, being one share of the capital stock; that no part of the subscriptions were paid, and that the Glass Company was insolvent. No part of the capital stock was ever paid into the treasury of the company. The court found that the incorporators were liable as guarantors to the plaintiff, who was the sole creditor of the Glass Company, for as much of his claim, interest and costs as should not be paid by the Glass Company and the stockholders, and entered judgment accordingly.

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It is contended by the plaintiffs in error that in the original suit against the Glass Company jurisdiction was not obtained of that company, it being claimed that service was made on one Edgar Berry as the duly elected president of the company, whereas it was claimed that, in fact, no president had been elected. As to this, it is sufficient to say that it appears from the record that the service on the Glass Company was not attacked or questioned in the original action in any manner. On the contrary, that company filed an answer in which it admitted that it was a corporation duly organized under the laws of Ohio, and proceeded to set up matters of defense to the action. This was a general appearance by the defendant, and amounted to a waiver of service.

It is also insisted that the circuit court erred in entering judgment against the incorporators, because it is claimed that no certificate of the subscription of ten per cent. of the capital stock of The Vernonview Glass Company was ever signed by the incorporators and filed with the secretary of state. As already stated, the court found in the original case, and also in the subsequent equity case, that The Vernonview Glass Company was a corporation duly created and organized under the laws of Ohio, and that it became indebted as such to the Foundry & Machine Company in the amount stated. In such circumstances the presumption is that the organization was made in accordance with legal requirements.

But it is contended by plaintiffs in error that this finding and judgment can create no presumption that anything more was done than was neces-

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sary to legally organize the company. That is, that under Section 8633, General Code, ten per cent. of the capital stock was subscribed, of which portion, ten per cent., or \$650, was payable at the time of the subscription, and that under Section 8634, General Code, the liability of the incorporators is for the amount of any deficiency in the payment of ten per cent. on the stock subscribed, and, therefore, could not exceed \$650.

However that may be, in a case in which the question is presented, it cannot avail plaintiffs here. The statute, as it stood at the time of the occurrence of the transactions involved in this proceeding, was included in Section 3244, Revised Statutes, and provided that as soon as ten per cent. of the capital stock was subscribed, the subscribers to the articles of incorporation, or a majority of them, should so certify in writing to the secretary of state, and also contained the provision: "The incorporators of the company shall be liable to any person affected thereby to the amount of any deficiency in the actual payment of said ten per cent. at the time of so certifying." In *Hessler v. Cleveland Punch & Shear Works Co.*, 61 Ohio St., 621, it was held that the liability of the incorporators under Section 3244, Revised Statutes, is for the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock of the corporation at the time of their certifying as therein provided, and not merely one-tenth of that amount. In the opinion it is stated that the incorporators are, in effect, made guarantors of the corporation to that amount. The duty of the incorporators, as to the filing of

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the certificates and their liability with respect thereto, is, in addition to the personal liability of each stockholder, to pay for the stock subscribed by him.

The constitution confers upon the legislature authority to provide means to secure the creditors of a corporation. Such provisions are necessary to insure good faith and to secure protection to persons dealing with such organizations.

The judgment of the court below will be affirmed.

Judgment affirmed.

JOHNSON, DONAHUE, WANAMAKER, NEWMAN
and WILKIN, JJ., concur.

THE STATE, EX REL. SCHREIBER, CITY SOLICITOR,
v. MILROY, PROSECUTING ATTORNEY.

Section 1d, Article II, Constitution—Laws providing for tax levies not subject to referendum—Does not apply to act amending Sections 5649-2 and 5649-3b, General Code—Relative to limitation of tax rate and reorganization of budget commissions—Such enactment not effective for ninety days, when—Constitutional law.

An act to amend Sections 5649-2 and 5649-3b and repeal Section 5649-3, General Code, relative to the limitation of a tax rate, passed April 16, 1913, approved May 6, 1913, and filed in the office of the secretary of state May 9, 1913, is not a law providing for tax levies within the meaning of those words, as used in Section 1d of Article II of the Constitution, and the same cannot go into effect until ninety days after it was filed in the office of the secretary of state.

(No. 14210—Decided June 27, 1913.)

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IN QUO WARRANTO.

Mr. Cornell Schreiber, city solicitor, and *Mr. Alonzo G. Duer*, assistant city solicitor, for relator.

Mr. Charles M. Milroy, prosecuting attorney; *Mr. Timothy S. Hogan*, attorney general; *Mr. Clarence D. Laylin*; *Mr. Thomas L. Pogue*, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Charles A. Groom*, assistant prosecuting attorneys, for respondent.

BY THE COURT. This is a proceeding in *quo warranto* brought in this court by Cornell Schreiber, as city solicitor of the city of Toledo, against Charles M. Milroy, as prosecuting attorney of Lucas county.

It is alleged in the petition that the budget commission of Lucas county met on the first Monday in June, 1913, and there were present the mayor of the city of Toledo, the county auditor and the prosecuting attorney of Lucas county and the relator herein, Cornell Schreiber, city solicitor of the city of Toledo; that Schreiber, as such solicitor, demanded that he be recognized as a member of the board of budget commissioners, which right was denied, and it is alleged further that the prosecuting attorney, defendant herein, was illegally recognized as a member of said commission; that he has no right to act as such, but has usurped, intruded into and unlawfully holds and exercises said office. The relator asks that de-

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fendant be ousted and excluded therefrom, and that he, the relator, be inducted into said office.

The relator claims the right and title to the office in question under and by virtue of the provisions of an act of the general assembly, passed in April, 1913, approved by the governor May 6, 1913, and filed in the office of the secretary of state May 9, 1913.

This act amends and repeals certain sections of an act known as the "Smith One Per Cent Law." It repeals Section 5649-3 and amends Sections 5649-2 and 5649-3b.

Section 5649-3b, as amended by this act, provides that the budget commission of each county shall consist of three members—the county auditor, the mayor of the largest municipality in the county, and, in counties in which the amount of taxable property in the cities and villages thereof exceeds the amount of taxable property of territory outside of the cities and villages, the third member shall be the city solicitor of the largest municipality in the county.

Defendant denies the right of the relator to act as a member of the board of budget commissioners for the reason that the act in question is not, at present, in effect. In support of his contention, he calls attention to the provisions of Article II of the Constitution. This article provides for the initiative and referendum, and contains the provision that no law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as provided in said article.

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Section 1*d* of Article II is as follows: "Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions, and emergency laws necessary for the immediate preservation of the public peace, health or safety, shall go into immediate effect. Such emergency laws upon a ye and nay vote must receive the vote of two-thirds of all the members elected to each branch of the general assembly, and the reasons for such necessity shall be set forth in one section of the law, which section shall be passed only upon a ye and nay vote, upon a separate roll call thereon: The laws mentioned in this section shall not be subject to the referendum."

The relator contends that the act under which he is claiming title to the office is one providing for tax levies, and comes within the exceptions mentioned in Section 1*d*, *supra*.

Sections 5649-2 and 5649-3*b* comprise the act which the relator designates as "a law providing for tax levies." This act, by Section 5649-2, imposes a limitation upon the aggregate amount of all taxes that may be levied, and the other section in said act creates the budget commission.

The general assembly did not, in this act, impose a tax, stating distinctly the object of the same, nor did it fix the amount or the percentage of value to be levied, nor did it designate persons or property against whom a levy was to be made. It merely imposed certain limitations and created an agency. The act cannot be said to be one "providing for tax levies," within the meaning of those words as used in Section 1*d* of Article II

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of the Constitution. It is, therefore, clearly subject to the referendum and cannot become effective until ninety days after it was filed in the office of the secretary of state.

The validity of this act is challenged. It is unnecessary to consider this in determining the rights of the relator in this case as in no event could he claim title to the office in question until ninety days after May 9, 1913.

Writ refused.

SHAUCK, C. J., JOHNSON, DONAHUE, WAN-
AMAKER, NEWMAN and WILKIN, JJ., concur.

THE BALTIMORE & OHIO RAILROAD COMPANY
v. FOUTS.

Master and servant—Personal injury—Engineer of train not guilty of negligence—In misinterpreting signal by conductor, when.

A conductor of a train of cars undertook to control the movement of his train by a signal to the engineer from a place on the train where he could not see the engineer and the engineer could not see more of him than his head and his hand rising and falling beside his head. The signal was a backward motion of the arm in a complete vertical circle about the shoulder as a center. This could have been given as easily from a place where the body and the whole circuit of the arm of the conductor could have been seen by the engineer, and the rule of the service required that the conductor put himself in plain view of the engineer when giving the signal. The movement of the hand up and down toward the engineer in a short arc means "go ahead." The engineer interpreted the signal as given to mean "go ahead" instead of "back up." *Held:* This was not negligence on the part of the engineer.

(No. 13429—Decided March 18, 1913.)

ERROR to the Circuit Court of Mahoning county.

Statement of the Case.

Fouts was conductor and one Barnes was engineer of the company's eastbound freight train. At 1 o'clock on the 3rd day of October, 1908, the train came to a switch, where it was cut in two for the purpose of drawing two cars out of the siding. There were ten or twelve cars in the forward section attached to the engine, and it was drawn forward till the end passed the switch points. The brakeman threw the switch to let the forward section back into the siding. Fouts got upon the deck of the last car at the rear end. He gave the back-up signal and put himself in position for the backward motion. The engineer could see only the upper part of the sign and took it for a go-ahead signal and moved the train forward, which threw the conductor backward off the car to the ground, and both bones of his right leg were broken so that it had to be amputated below the knee. He sued the company for damages, alleging that the engineer negligently interpreted his back-up for a go-ahead signal. The affirmative defense was that Fouts violated a rule of the company by giving the sign where he could not see the engineer and the engineer could not see him, and that the small part of the signal which was visible above the deck line of the first car indicated an opposite signal.

The jury awarded him \$7,500 damages. Motion for a new trial was overruled and judgment was entered on the verdict, and the circuit court affirmed the judgment. Error is assigned here, amongst others, that the verdict is not sustained by any evidence, and that the verdict and judgment should have been against Fouts upon the undisputed facts.

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Messrs. Arrel, Wilson, Harrington & De Ford,
for plaintiff in error.

Mr. D. F. Anderson, for defendant in error.

WILKIN, J. The controversy is between two employes of a railroad company. The question is, Which one was negligent, the one who gave or the one who received a signal?

1. What was the signal? The signal is given by a motion of the arm up and down in a plane perpendicular to and in a line with the track; if it be a back-up signal, the motion will be directed away from the engineer and describe a circle; if it be a go-ahead signal, the motion will be toward the engineer, up and down, and the arm will describe only a quadrant or less of a circle, not a complete circle. The motion may be by the arm from the shoulder as the center or by the hand from the wrist as the center. The former is called the arm movement, the latter the wrist movement. It is manifest that the significance of the signal is determined by the direction of the motion, if not enough of it is seen to make out a circle.

It is conceded that the track was straight, the day was clear and that the conductor, Fouts, standing on the top of the rear end of the last car, was between five and six hundred feet distant from the engineer, who was standing in his cab with his head out of the side window looking back (west) for a signal. It is not disputed that the deck line of the car next to the engine was about four feet higher than the head of the engineer,

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and that only the head of the conductor appeared above that line, to the vision of the engineer. In this situation Barnes saw the head of a man in the sky; he could not tell who he was, for he says he could not discern the features; and that fact is not denied but is confirmed by Fouts, who says he could not see Barnes at the cab, although Barnes was looking against the light and Fouts was looking from the light.

Fouts testified that he gave the circular sign by the arm movement to back up. Barnes testified that he saw only the wrist movement as a go-ahead signal. By the very nature of the case and the situation of the two men, their statements are not contradictory, for all that Barnes could see of the circle above the roof line of the car next to him, if Fouts gave the arm movement, would be but a small arc of the circle; Fouts' hand would be seen against the bright afternoon sky rising and falling in the plane of Barnes' vision. Nobody has said and nobody can say that the direction of the circular motion would be apparent to him in an arc so short; it could not be more than one-quarter of the circle.

Consequently his testimony is the only evidence as to the signal which he received, no matter what the form of the signal which was given. His statement of what he saw, not only has not been contradicted but is not impaired by the testimony or the circumstantial evidence in the case. Granted that the motion of the hand in the arc was a movement backward and not simply up and down, we are not concerned with that fact *at the end of the train*, but with another fact *in the cab of the*

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engine, namely, the state of Barnes' mind. Nothing in the record nor in the state of nature raised the slightest inference that this latter *fact* was other than Barnes says it was, to-wit, the sight of the hand against the sky rising and falling above the base line of vision. That was the go-ahead signal by the wrist movement.

This being the first essential fact in the case, and absolutely proven to be as the defendant asserts it to be, the verdict of the jury has not a jot of evidence to support it on that branch of the issue.

2. Let us now examine the second branch of the issue. Conceding that Fouts gave the signal as he says he gave it, was Barnes negligent for seeing the sign as he saw it? Did he omit to use the ordinary care of a prudent engineer in looking for the signal? There is not a spark of testimony that he did. Plaintiff's theory is that the negligence of the observer is a *prima facie* inference from the error of his observation; therefore, this inference supports the verdict and makes a *prima facie* case. But the answer to this is that there is not one syllable of evidence that the observer was negligent in the slightest particular, nor is there any evidence from which a legitimate inference can be drawn.

This question must be answered by common sense, from uniform experience. The primary fact is that he could not see all of the sign, if Fouts gave it as he says he did; he saw but the upper part of it which was visible above the deck line of the car next to him, namely, a hand up beside the head, waving up and down. Should

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he have seen the direction of its motion, whether it was circular and backward?

He could not see the curve of motion in the vertical plane of vision. A visual image and its changing position up and down, was all that the eye saw and all that the brain knew *by sight*. The variation of the color and contour of the image and especially *the figure described by its motion* were necessary to show that it was the backward sign. These phases would be added *in the mind* to the original image as attributes. Thus the successive percepts of the changing position of hand and arm *backward in a circle*, would merge into one composite mental picture, or concept. This concept is what we say we *see*, whereas it is a pure product of the mind; it is a judgment of what we see. Barnes saw just enough of the hand's motion at the side of the head to complete the short sign; he judged it to be the go-ahead signal—which it was. He did not see the hand and its backward motion below the horizon of vision. He did not include that invisible phase in the mental picture of what he saw. He did not *imagine* he saw a figure three-fourths or more of which was out of sight, since what he saw was complete in itself and had a definite meaning.

Now Barnes, the engineer, is accused of negligence, because he failed to understand a certain gesture of the arm given him by the conductor, Fouts, at a distance and in a place where only a small part of the gesture was visible to him. Had he seen the whole gesture it would have meant a back-up signal; he saw but one-fourth of it or

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less, a gesture of the hand from the wrist, up beside the head. What appeared to him as a wrist movement, he judged was not an arm movement. It was a go-ahead signal, and he obeyed it. The jury found him guilty of negligence on this state of facts, because he did not imagine he saw what he did not see.

It is said he should have known the sign by the position of the hand and the curve which it described. This proposition begs the question. If the play of light and shade upon the conductor's head was not sufficient to discern at that distance whose head it was, then naturally it was not sufficient to discern whether the palm or the back of the hand was presented—just as Barnes testifies. If the motion of the hand, through the short arc that was visible, was across the plane of vision, its direction would not be backward, and it would not mean a back-up signal. If it was in the line of vision, the direction of the circle, whether forward or backward, would not be apparent, so far away; the hand would be seen to rise and fall, which would be a go-ahead signal—just what he testified it appeared to be.

Stress is laid upon the admitted fact that Barnes was expecting a back-up signal. This goes upon the principle of mental suggestion; which is, that when an ocular image, or a percept of any other sense, is presented to the mind, the very habit of the mind is to clothe the barren image with some attributes by which it will mean something. A common expression is that "wish is father to the thought;" the same may be said of expectation. But this by no means proves that if Fouts gave

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the sign of a bird in its flight that Barnes should have seen in his mind's eye a crawfish and have gone backwards. Suppose the last car had stopped too near the switch, which often happens, and that Fouts had given a signal to go ahead so as to bring the rear wheels past the switch points, and Barnes, expecting a back-up signal, had misread the go-ahead as a back-up signal, and the unexpected backward movement of the car had thrown Fouts off and injured him, would the law of suggestion have excused him in the courts below? Why not? Because they would have said that it was his duty to obey the signal which was given him and not the law of suggestion. Another answer to this argument of suggestion is, though an engineer expects a signal to back into a switch, he knows by common experience that he may have stopped short, and the instant he gets a go-ahead signal he knows what has happened and he pulls ahead. The suggestion of expectation is immediately corrected. Barnes says he thought he had not cleared the switch points. Barnes is not a psychologist nor expert in the art of introspection. Because he could not explain the natural operation of his own mind as he would the mechanical operations of his engine, that is no reason in the world that the state of his mind, at the time he saw the conductor's head and hand above the cars, was not just what he says it was. As we have already said, it is impossible for anybody, by any method of proof, mental or physical, to impeach his statement of what he saw. The verdict of the jury is not only unsupported by any evidence but it is also directly contrary to the evidence.

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The plaintiff's counsel tried to break the conclusive effect of Barnes' statement by drawing from him this rule of the service, to-wit: "In case of doubt or uncertainty, the safe course must be taken and no risks run." This argument also begs the question. It implies that Barnes must have been in doubt about what he saw. But such is not the fact. Barnes testifies promptly and positively that he had no doubt at all. Counsel seems to have the notion that because Barnes saw only the conductor's head and could not have seen the full signal, therefore if he had been duly cautious he would have been in doubt and should not have acted. Manifestly that deduction would be right if the only part of the signal which he saw was ambiguous, but the part he saw was exactly the go-ahead sign, and therefore was not ambiguous. So that this circumstance does not afford a scintilla of proof to support the verdict.

3. Now we come to the third branch of the issue, namely, contributory negligence. By the plaintiff's method of cross-examination of the engineer, he gave the deathblow to his case. He attempted to make apparent that it was negligence for Barnes to receive a signal given as and where that signal was given; that he should not have acted upon an imperfect signal. This argument clearly puts the fault of negligence upon the plaintiff, the conductor. For, if the signal could not be given perfectly or completely to the engineer from the top of the car at that distance back from the engine, he should not have got upon the car to give the signal, but should have given it from the ground, where all of it could have been seen

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distinctly. He was superior in rank to the engineer, and it was his duty to communicate his orders to his inferior so that they could not be misunderstood and bear a contrary meaning. If he gave half an order so that it appeared to be a whole order with nothing left off, that was his own blunder, due to his reckless choice of an imperfect method of communicating his commands. It is therefore absolutely clear on the record of the whole case that whatever negligence may be imputed to these servants, it belongs to the superior in service, the conductor, who is in charge of the train; for his was the initial act which was the direct, proximate and efficient cause of his injury; the engineer was his innocent agent to carry out his will. He expressed his will one way though he intended the opposite.

As an excuse for giving the signal from the top of the car, the plaintiff says he got up there so as to be the better able to direct the movements of the train when it would *enter the curved siding*. But this does not explain why he should give the signal from the top of the car, *on a straight track*, before it entered the siding. He admits the signal could have been given in a more favorable circumstance and to better advantage from the ground. The fact that he offered any excuse at all is a confession that the act was wrong.

He further says that he stood at the edge of the car and leaned out to make the signal, but he admits that he could not see the engineer, whose head stuck out of the cab window. The record shows the car next the engine about two feet wider than the cab. How then could the engineer

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see him past the edge of the car? The proof shows that by a rule of the road it was his duty to place himself in full view of the engineer before attempting to give a signal. He says he leaned out from the edge of the car as far as he could. But there is no evidence that he, on the eleventh car back, without anything to hold to, could lean out far enough to make the vertical circle with his arm so it could be seen from the cab window. Possibly it might be done, but the verdict can stand only upon some proof of what was done, not upon conjecture of what might be done.

Now let us suppose that this conductor, Fouts, had brought his action against his engineer for damages to compensate him for the loss of his leg, which he could have done; for if Barnes' negligence caused his injury, Barnes is primarily liable to pay for the wrong, and the employer is only responsible secondarily. Had he sought to enforce this primary liability first, would the jury have found Barnes guilty and condemned him to pay his conductor \$7,500 for the loss of his leg? If such a verdict would not be just and lawful against Barnes of course it can not be against his employer, the railroad company.

Objection is made that the record does not present to us all the evidence in the case; that concrete evidence of the signal was given to the jury by ocular demonstration in the court room, and that this exhibition of the real thing is more reliable than word pictures of it. This objection is untenable and it points out the very source of the error of the lower courts. It was a mistake to let the plaintiff attempt to reproduce in view of

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the jury in the court room the signal which he thought he gave. The controversy was not about how he made the signal, but how it appeared to the engineer in his situation in the open country as seen against a bright afternoon sky at five hundred to six hundred feet distant when only the head and hand of the conductor were visible. What the jury saw close at hand within doors under a subdued light was a distinctly different thing than that which was presented to Barnes, against a bright sky, five to six hundred feet away.

This sort of evidence is called "autoptic" or "real" proof, to distinguish it from testimonial and circumstantial proof. In his Pocket Code of Evidence, page 31, Wigmore says: "In the latter classes the tribunal is asked to make an inference from the evidential fact to some other fact, while in the former the tribunal is asked to perceive immediately by the senses without inference." Would anybody be bold enough to say that the jury could directly perceive in this mimicry in the court room, without the proper stage accessories, exactly how Fouts' gestures on top the car looked to Barnes in the cab? The exhibition was deceptive and misleading. The exclusion of it from our view of the case, instead of impeaching our judgment, affords the substantial reason of our judgment, by exposing the initial essential error of the courts below.

Judgments reversed, and judgment for plaintiff in error.

SHAUCK, C. J., JOHNSON and DONAHUE, JJ.,
concur. NEWMAN, J., dissents.

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WANAMAKER, J., dissenting. Fouts, a conductor of a B. & O. freight train, brought suit against the railroad company for the negligent moving of his train contrary to and in violation of his own signals, whereby he was thrown from the top of a box car and lost his leg.

The case was tried to a jury before Honorable George F. Robinson, judge of the common pleas court of Mahoning county. The jury found the railroad company was proven negligent by a preponderance of the evidence and returned a verdict in favor of Fouts for \$7,500. A motion for a new trial was promptly made by the railroad company, one of the grounds for which was that the verdict was contrary to the weight of the evidence. Judge Robinson, one of the ablest and oldest (in point of service) judges of the state, had seen the witnesses face to face and considered their credibility as only a trial judge can. He saw the signals demonstrated before the jury, both as required by the rules of the company and as they were given on the day of the injury. With all these witnesses before him and these unusual opportunities for weighing the testimony Judge Robinson sustained the verdict and entered judgment thereon.

The railroad company prosecuted error to the circuit court. All three judges affirmed the court of common pleas. Then the railroad company prosecuted error to the supreme court, and this court now reverses the finding of the jury of twelve, the trial judge and the three circuit judges and holds "This was not negligence on the part of the engineer;" that is, the railroad company.

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The judgment of the four supreme judges, having greatly inferior opportunity to understand, apply and weigh the evidence, not being able to judge of the credibility of the witnesses because of never having seen or known them, now reverses the action of both lower courts and the jury, and then *enters final judgment for the railroad company.*

This is a most drastic doctrine. Indeed it is well nigh revolutionary.

Since when has the supreme court acquired the right to say in any given concrete case what is negligence and what is not negligence?

Questions of negligence are questions of fact for the jury and not questions of law for the court; at least, this court has often so decided, and indeed within a six-month so declared in the case of *Gibbs v. The Village of Girard*, ante, 34, the fourth paragraph of the syllabus reading as follows: "What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the determination of the jury under proper instructions by the court, appropriate to the particular circumstances of each case and the issues thereof."

Now we have a rule in this court, with which all lawyers at least are familiar, that we will not weigh the evidence. Two courts below having passed upon it their decision is final, and, therefore, the only way there can be a review of a question of fact below is to hold that there was absolutely no evidence on some one or more essential elements of the plaintiff's case. But it will be

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noticed that that is not the finding or holding of the majority in the syllabus of this case. The language of the syllabus is: "This was not negligence on the part of the engineer."

This court does not and could not hold that there is *no* evidence of negligence to be submitted to the jury, but it invades the province and duty of the jury by weighing and considering the whole evidence and holding that it does not show negligence against the railroad company. This usurpation by this court of the functions and rights of the jury and the parties to the suit is contrary to settled rules and practice of this court, and contrary to the provisions of both state and federal constitutions.

It is unfortunate that the statement of fact appearing in the syllabus is not the fair statement to which the plaintiff is entitled, for it is quite clear that either in determining whether or not there is any evidence, or whether there is sufficient evidence to support a verdict, the plaintiff is entitled to the *most favorable construction* as to the facts and as to the inferences drawn from these facts; for the jury evidently believed the plaintiff, whom they had before them, and disbelieved the defendant. The difficulty with the statement appearing in the syllabus is that the viewpoint of the court is the viewpoint of the railroad company and of Barnes, its engineer.

Now, the verdict of the jury, together with the judgment of the trial judge, involves a disbelief of the railroad company's contentions through Barnes, its engineer, because the railroad com-

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pany's own case was practically made out of Barnes, and if the jury believed Barnes it is reasonable to suppose that it would have found for the railroad company. The jury had all these witnesses before them, observed their tone, their manner, their general bearing in giving their testimony, their frankness or hesitation in testifying, and from all these things were able to give each witness the credibility to which he was entitled, which facts as affecting credibility could not be put in the record at all and which certainly gave the jury advantage over this court in weighing that evidence.

This court is now wholly believing the engineer's testimony, whom they never saw and do not know. This engineer was certainly as much interested in the result of this suit as was Fouts, because the negligence of the railroad company was practically the negligence of the engineer. Of what avail, pray, are juries anyhow, if they are not to weigh the facts in the light of the credibility of the witnesses who testify? Every lawyer and every judge, and indeed every one familiar with courts, know to what extent perjury is practiced in our courts of to-day. In a large number of cases courts and juries in effect do find that certain witnesses really commit perjury and, therefore, wholly disregard their evidence. They come to this conclusion from their appearance and manner and bearing when on the witness stand, but a reviewing court, that cannot see and hear the witnesses, is not in a situation to so weigh the evidence and fix the credibility of the witness.

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I have already indicated that the statement of fact appearing in the syllabus of this case is not a fair statement; by that I mean it is not fair to the plaintiff and is more than fair to the railroad company. What are the facts as testified to by Fouts and his witnesses? for Fouts is entitled to the most favorable aspect in which this testimony could be considered so far as this judgment of the supreme court is concerned.

The train was made up of ten to twelve box cars standing still on a straight east-and-west track, with the engine headed east. The engineer was on the right or south side of his cab. The conductor, Fouts, had climbed on top of the most westerly car, and testifies that he went to the south edge of the car, leaned out as far as he could and gave the usual "back-up" signal, and demonstrated before the jury how he gave it. Fouts further testified that that was "good railroading," and two of the defendant's witnesses, Daugherty and Wolfsberger, in answer to a hypothetical question, not objected to by the able and vigilant counsel of the railroad company, answered that that was "good railroading;" that is, giving the signal where Fouts gave it and in the way he gave it.

Now, how can it be said that the conduct of Fouts, in relation to the place he gave the signal and the manner in which he gave the signal, was "good railroading" in the judgment of the company's own experts, and at the same time a violation of a "rule of service" that required the conductor to put himself in plain view of the engineer when giving the signal, as stated by this court in the syllabus of this case? I prefer the judgment

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of the plaintiff himself, corroborated as it is by two practical railroad men who were witnesses for the railroad company, as to what is "good railroading," rather than the judgment of this court. How can Fouts' conduct on a box car in giving a signal be conformable to "good railroading" and at the same time Fouts be guilty of contributory negligence in that behalf, as the majority opinion contends?

Much is said in the majority opinion about "arc of circle," "plane of Barnes' vision," "variation of the color and contour of the image," "successive percepts of the changing of hand and arm backward in a circle would merge with one composite mental picture or concept," "ocular image," "art of introspection," and the like, but to my mind the simple, uncontradicted evidence that Fouts was on the south edge of the car, leaning out as far as he could to the south and then with his right arm gave the usual "back-up" signal required by the rules of the company, that not only Fouts but two of the defendant's witnesses say that this was "good railroading," and that thereupon, without any further signal, the engineer moved the train forward contrary to Fouts' "back-up" signal—such evidence was evidently more convincing to the men who composed the jury and to the trial judge, who heard and saw the witnesses, than any far-fetched, over-refined, technical treatise on the laws of light, vision and mental suggestion presented in the majority opinion.

If now the "back-up" signal was given at a proper place and in a proper way, why was the

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train moved the wrong way? Because Barnes did not obey or follow the signal. Why not? Either because of a temporary forgetfulness that happens to all men, even to train dispatchers who have the most important duties to perform, or because he did not get his head out of his cab window far enough to see the whole signal as he could and should have done, since three witnesses testified that this was "good railroading" on Fouts' part. If this was "good railroading" on Fouts' part then Barnes was certainly the negligent party in not putting himself where he could see the signal clearly, or else waiting until he did get a clear signal before he moved the train, as the rule of the company required.

Barnes took the risk of moving the train, according to his own testimony, knowing that in all probability that the man whom he saw on top of the car, if he had prepared himself for a backward movement and the train went forward, would in all probability be injured by being thrown from the car. But Barnes moved the train forward when there was no occasion for its forward movement, nor no signal for its forward movement—at least the jury so found.

Now, if Barnes saw only a small fractional part of Fouts' signal and interpreted it as a "go-forward" signal, as he claims, Barnes knew or should have known that such signal, appearing to him as a "go-forward" signal (as he says), might also be the upper or fractional part of the "back-up" signal, which latter was the signal he was looking for. His plain duty in such a situation was to wait until the signal was clear and definite; until

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he knew whether what he saw was the whole of the "go-forward" signal or the fractional part of the "back-up" signal. He knew or should have known that to move the train the wrong way was to imperil the life of the man whom he saw on the box car.

If Barnes had put his head and upper body out of the cab window, as good railroading would require when a signal is in doubt, then there would have been no mistake in the signal and no injury to Fouts.

There is such a persistent effort to uphold Barnes in the case that occasionally the facts in the record are inadvertently misstated. One incident will illustrate. The majority opinion speaks of Barnes' view being hindered by looking against the light. Now, be it remembered that this injury occurred at noon, that in all human probability if this track was east and west, as the record shows, and Barnes was on the south side, Fouts was to his west, and we have no information that the sun was not in its usual position to the south. If that be true, it is difficult to understand how Barnes was looking toward or into a degree of light that impaired his vision, as suggested in the majority opinion.

Let us apply another test. When the plaintiff had offered evidence showing, or tending to show, that he gave a proper "back-up" signal from the right side of the top of the rear box car, extending his body as far southward as he could; that the engineer was on the same side of the train; that the place and manner of giving the "back-up" signal was in accord with "good railroading;"

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that after giving the signal he poised and balanced his body to meet the sudden movement of the train pursuant to such "back-up" signal; that the train was thereupon, contrary to the conductor's signal, moved forward instead of backward, causing plaintiff's injury, and that the rule of the company, admitted by Barnes to be correct, required the engineer to be sure of his signals before he moved the train—all these facts most clearly and conclusively make a *prima facie* case of negligence against the railroad company. Who dare contend that this does not make a clear, *prima facie* case against the railroad company? If this is not a *prima facie* case, pray what would make a *prima facie* case? What element is lacking to make a *prima facie* case?

No one has contended before this court that the trial judge should have directed a verdict at the close of the plaintiff's case, and the majority opinion nowhere indicates that such direction should have been made by the trial judge at the close of plaintiff's case. If the defendant had not offered any testimony it must follow most conclusively that Fouts was entitled to a verdict, and the question simply was, how much?

But it is contended that because Barnes, the engineer, who testified for the defense, says that, in perfect good faith, he understood the signal as meaning go forward, therefore the *prima facie* case of negligence is overcome; yes, more, is absolutely eliminated, and there is now no evidence of negligence.

That is a new rule of practice, a new rule of inference, presumption and deduction. It is an

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astonisher in the laws of logic. All that Barnes' testimony could possibly do would be to make it a question for the jury, one for them to determine whom to believe and whom not to believe, and to what degree to believe them. They were in a position to do that because of seeing and hearing the witnesses, but we are not.

It is a primary fact in the great majority of cases of negligence that there is no bad faith, no malice, no willful intent, but quite the contrary. But still it is negligence. To say that Barnes' evidence claiming good faith *per se* destroys the plaintiff's evidence is about as plausible a deduction as to say that Barnes ordered the fireman to burn up the plaintiff's evidence so that by the time it reached the court it would be merely ashes and cinders.

This proposition is absolutely too ridiculous to need any further comment. Its absurdity is apparent on first analysis. When the plaintiff had made a *prima facie* case it then became a question for the jury, and nothing that the defense could possibly offer by way of denial, explanation or mitigation could or would destroy the right of the plaintiff to have his case submitted to the jury upon the evidence in the record. It being a case for the jury it is not a case for this court, which should not weigh the evidence in cases of this character.

But again, it is impossible for this court to have before it in this record all the evidence that was offered in the trial court. Both Fouts and Barnes repeatedly demonstrated the various signals, "back-up" signals and "go-forward" signals, so that the

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jury and trial judge could understand by manual illustration just what those signals were and how they were given. Of course, it is folly to say that such demonstrations could be reproduced in this record. The majority opinion, however, seeks to overcome this infirmity by holding that this evidence as offered in the trial court was incompetent, though there is no such holding in the syllabus. The reason assigned in the opinion for its incompetency is that the conditions under which the signals were given on the day of the injury and on the day of the trial were entirely different. The record does not disclose any objections to these demonstrations, but even if it did, this character of evidence has always been recognized as of the very highest and most convincing type. If the doctrine of the majority opinion be true, then before such evidence could be given a railroad track, train and engine would have to be built in the court room before the jury could be put in the situation of the parties and before the parties could demonstrate their various signals and movements in connection with the operation of the train. The absurdity of this contention is too apparent to need any argument whatsoever.

During the preparation of this opinion I have again carefully gone over the very able and learned brief of counsel for The B. & O. Railroad Company. Under the head of "Argument" the following subheads appear as the contentions of the railroad company, *first*, "No negligence or want of ordinary care shown on the part of the engineer."

I claim that this involved no more than the determination and conclusion of fact for the jury.

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It is not claimed here that there was *no* evidence of negligence or want of ordinary care.

The second subhead of plaintiff in error's brief is as follows: "Failure of the conductor, Charles H. Fouts, to exercise ordinary care, the sole proximate cause of the accident."

If the question of negligence as against the railroad company is a question for the jury, clearly it must follow by parity of reason and law that the question of negligence upon the part of the plaintiff is also a question of fact for the determination of the jury, and, of course, it is uniformly held that the question of proximate cause of the injury is a question also for the jury.

The third subhead deals with the "Law applicable to the case," whether or not this cause of action is governed by the federal employers' liability act of 1908, or whether it is governed by the Ohio Metzger act of 1908.

The remaining subhead is "Requests to charge before argument," and the last the "Interrogatories" that the court refused to submit to the jury.

Nowhere in the brief of counsel for the railroad company is any claim made that there was *no* evidence of negligence against the railroad company to be submitted to the jury, but that the evidence as a *whole* does not show negligence against the railroad company.

Negligence being a conclusion of fact from the facts proven, it was unquestionably for the jury to determine, and therefore not a question for this court.

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I want to make another contention here. I think it is high time that the same be made.

We presumably have in this country a constitutional guaranty of the right of trial by jury. This right is declared and safeguarded in the federal constitution as well as in every state constitution, the language generally being that "the right of trial by jury shall be inviolate." The judgment of this court absolutely and squarely violates that constitutional provision. The supreme court of the United States has dealt with this same question in a comparatively recent case, decided April 21, 1913, *Slocum v. New York Life Insurance Co.*, 228 U. S., 364, the syllabus of which reads as follows: "The power of a Federal court to re-examine issues of fact tried by a jury must under the Seventh Amendment be tested by the rules of the common law.

"Under the rules of the common law an appellate court may set aside a verdict for error of law in the proceedings and order a new trial *but it may not itself determine the issues of fact.*

"Under the rules of the common law when the court sets aside a verdict there arises the same right of trial by jury as in the first instance.

"In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors.

"Whether the facts are difficult or easy of ascertainment is immaterial, the guaranty of the Seventh Amendment operates to require the issues to be settled by the verdict of a jury unless the right thereto be waived."

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As vigorously as I can I desire to contend against this judgment on constitutional grounds, because:

First. It violates both federal and state constitutions, in that this court here undertakes to re-examine and reconsider the evidence and find the same contrary to the finding of the jury and trial judge.

Second. After making such unwarranted finding, contrary to that of the trial court, this court has gone the limit and rendered final judgment contrary to the verdict of the jury and the judgment of the trial court thereon, and contrary to both state and federal constitutions. If, now, this court has any right, in violation of its own rule and the plaintiff's constitutional rights, to reverse the case upon the weight of the evidence, it most certainly cannot have the right to enter final judgment and forever foreclose the defendant from a further right to submit his case to a jury.

I am not unaware of the fact that an appellate court has often heretofore assumed the right to reverse the judgment of a jury and the judgment of a trial court on the ground that the verdict is against the weight of the evidence, and also then to enter the judgment that it believes the trial court should have entered. But I here and now challenge the right of any appellate court to do either under the provisions of the constitutional guaranty of the right of trial by jury. The assertion of this right is not only sanctioned in some jurisdictions by long practice, but it may be said that it is further fortified by the provisions of our statutes authorizing a new trial upon the ground

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that the verdict is against the weight of the evidence. But I desire to deny the constitutionality of any such statute in derogation and violation of the rights of the parties to a trial by jury. Such an assertion of right as is contended for here by plaintiff in error amounts to a denial and defeat of the right of trial by jury. It is in effect a mere mockery to say at their pleasure appellate courts may ignore the verdict of the jury and substitute therefor their own judgment upon a mere question of fact, when the constitutional provisions have all endeavored to safeguard the rights of all parties so as to make all questions of fact in suits at law triable by jury as it was under the old common law. This contention in the federal case last referred to I ardently support.

I want to quote briefly from the majority opinion in that case and invite all interested counsel and parties to carefully read the entire opinion, minority as well as majority. I pause here to suggest that, on the matter of law, so far as applicable to the case at bar, there is no essential difference between the two opinions, the minority opinion being founded upon the claim that, upon the whole record, there was no issue of fact to be submitted to a jury; that the facts are substantially all conceded, and that, therefore, it became a question of law for the court. But the majority opinion held that notwithstanding the trial court should have directed a verdict in accordance with the finding of the circuit court of appeals, still the circuit court of appeals had no right to assume the question of fact and enter final judgment, but, upon the contrary, it was their duty to remand the case to the trial court for another trial by jury.

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Judge Van Devanter quotes freely from the case of *Parsons v. Bedford*, 3 Pet., 433. The opinion is by Mr. Justice Story: "Trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy * * *. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress, and which received an assent of the people so generally as to establish its importance as a fundamental guarantee of the rights and liberties of the people. * * * The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."

In *Walker v. New Mexico, etc., Railroad Co.*, 165 U. S., 593, decided in 1897, Justice Brewer said: "Its aim [Seventh Amendment] is not to preserve mere matters of form and procedure but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume directly or indirectly to take from the jury or to itself such prerogative. * * *

"Now a general verdict embodies both the law and the facts. The jury, taking the law as given

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by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. The power of the court *to grant a new trial* if in its judgment the jury have misinterpreted the instructions as to the rules of law or misapplied them is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact."

In *Capital Traction Co. v. Hof*, 174 U. S., 1, decided in 1899, Mr. Justice Gray holds to the same doctrine.

Judge Van Devanter, after reviewing these numerous cases, uses this language: "These decisions make it plain, first, that the action of the Circuit Court of Appeals in setting aside the verdict and assuming to pass upon the issues of fact and to direct a judgment accordingly must be tested by the rules of the common law; second, that, while under those rules that court could set aside the verdict for error of law in the proceedings in the Circuit Court and order a new trial, it could not itself determine the facts; and, third, that when the verdict was set aside there arose the same right of trial by jury as in the first instance. How, then, can it be said that there was not an infraction of the Seventh Amendment? When the verdict was set aside the issues of fact were left undetermined, and until they should be determined anew no judgment on the merits could be given. The new determination, according to the rules of the common law, could be had only

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through a new trial, with the same right to a jury as before. Disregarding those rules, the Circuit Court of Appeals itself determined the facts, without a new trial. Thus, it assumed a power it did not possess and cut off the plaintiff's right to have the facts settled by the verdict of a jury.

"While it is true, as before said, that the evidence produced at the trial was not sufficient to sustain a verdict for the plaintiff and that the Circuit Court erred in refusing so to instruct the jury, this does not militate against the conclusion just stated. According to the rules of the common law, such an error, like other errors of law affecting a verdict, could be corrected on writ of error only by ordering a new trial. In no other way could an objectionable verdict be avoided and full effect given to the right of trial by jury as then known and practiced. And this procedure was regarded as of real value, because, in addition to fully recognizing that right, it afforded an opportunity for adducing further evidence rightly conducing to a solution of the issues. In the posture of the case at bar the plaintiff is entitled to that opportunity, and for anything that appears in the record it may enable her to supply omissions in her own evidence, or to show inaccuracies in that of the defendant, which will rightly entitle her to a verdict and judgment in her favor. * * *

"In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of direction and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-opera-

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tion of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dispense with either or to permit one to disregard the province of the other is to impinge on that right. * * *

"To the suggestion that in so holding we are but adhering to a mere rule of procedure at common law there is a twofold answer: First, the terms of the Amendment and the circumstances of its adoption unmistakably show that one of its purposes was to require adherence to that rule, which in long years of practice had come to be regarded as essential to the full realization of the right of trial by jury; and, second, the right to a new trial in a case such as this, on the vacation of a favorable verdict secured from a jury, is a matter of substance and not of mere form, for it gives opportunity, as before indicated, to present evidence which may not have been available or known before, and also to expose any error or untruth in the opposing evidence. As is said in Blackstone's Commentaries, vol. 3, p. 391: 'A new trial is a rehearing of the cause before another jury. * * * The parties come better informed, the counsel better prepared, the law is more fully understood, the judge is more master of the subject; and nothing is now tried but the real merits of the case.'"

In conclusion, I contend that the verdict of the jury is abundantly supported by the evidence as contained in the record of the case; that, if it were not so supported in the judgment of this court, we have no legal or constitutional right to nullify or set it aside on the mere ground that it is

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against the weight of the evidence; that we have absolutely no right to enter final judgment contrary to the verdict of the jury; and that, finally, by the judgment of the supreme court, we have amended the Ohio Constitution, Article I, Section 5, Bill of Rights, which reads, "The right of trial by jury shall be inviolate," by adding thereto as "court-made" constitution the words, "except in cases where the trial judge or some appellate court thinks otherwise as to the facts in the case."

LEGLER, ADMR., ET AL. *v.* THE UNITED STATES
FIDELITY & GUARANTY CO.

*Surety bond—Suit to enforce—Defense of knowledge by employer
—Of previous default by employe.*

(No. 13274—Decided May 13, 1913.)

ERROR to the Circuit Court of Montgomery county.

Mr. D. B. Van Pelt and Messrs. McConnaughey & Shea, for plaintiff in error.

Messrs. Matthews, James & Matthews, for defendant in error.

BY THE COURT. All the provisions of a contract must be construed together in determining the meaning and intention of any particular clause or provision therein. The provisions in a surety bond, in reference to the employer's statement in the ap-

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plication for the bond, that "The above and foregoing statements and representations are made for the purpose of inducing the United States Fidelity & Guaranty Company to execute this bond," and "It is agreed that the above answers are to be taken as conditions precedent and as a basis of said bond applied for or any renewal or continuation of the same that may be issued by The United States Fidelity & Guaranty Company to the undersigned upon the person above named," and the further provision that "If the employer's written statement heretofore referred to shall be found in any respects untrue this bond shall be void," must be construed in connection with a later provision of the bond that "This bond is issued on the express understanding that the employe has not within the knowledge of the employer at any former period been a defaulter."

In view of this provision of the bond following the provisions first quoted, it appears that it was the intention of the parties, clearly expressed in this clause, that where the default of the employe at any former period is not within the knowledge of the employer, and that the questions answered are truthfully answered so far as his knowledge is concerned, the fact that such employe at a former period had been a defaulter would be no defense to a suit upon the bond, unless it further appears that such statements were intentionally false or were recklessly or negligently made without any reasonable grounds on the part of the employer to believe that said statements were true, and without reasonable effort on his part to make use of the means at hand to discover the truth or falsity of the statements.

Syllabus.

This provision of the bond pleaded in the amendment to the reply distinguishes this case from the case of *Livingston & Taft, Trustees, v. Fidelity & Deposit Co.*, 76 Ohio St., 253.

Judgment of the common pleas court sustaining demurrer to reply and amendment thereto and the judgment of the circuit court affirming the judgment of the common pleas court are reversed, and cause remanded to the common pleas court with directions to overrule the demurrer to the reply and amendment thereto.

Judgments reversed.

JOHNSON, DONAHUE, WANAMAKER, NEWMAN
and WILKIN, JJ., concur.

FITZGERALD ET AL., BOARD OF DEPUTY STATE
SUPERVISORS, ETC., *v.* THE CITY OF CLEVELAND.

Section 7, Article XVIII of amended Constitution—Authorizes municipalities to frame charter for government—Departmental powers limited by Section 3 of Article XVIII—Officers shall be appointed or elected—Nominations for elective offices may be by prescribed petition—Elections shall be conducted by general laws—Constitutional law—Self-government of municipalities.

1. The provisions of Section 7, Article XVIII of the Constitution as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government and it may prescribe therein the form of the government and define the powers and duties of the different departments, provided they do not exceed the powers granted in Section 3, Article XVIII, nor disregard the limitations imposed in that article or other provisions of the constitution.
2. Under Sections 3 and 7, Article XVIII, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which

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elected, that the nomination of elective officers shall be made by petition by a method prescribed, and elections shall be conducted by the election authorities prescribed by general laws.

(No. 14308—Decided August 26, 1913.)

ERROR to the Court of Common Pleas of Cuyahoga county.

The defendant in error filed its petition in the common pleas of Cuyahoga against the plaintiffs in error, the Board of Deputy State Supervisors and Inspectors of Elections for Cuyahoga County, seeking to enjoin them from holding a primary election for the nomination of candidates for the elective municipal offices of the city of Cleveland.

The petition alleges that the defendants below constitute such board of state supervisors and inspectors and have charge of all elections and primaries held in said city of Cleveland; that by virtue of Sections 3 and 7 of Article XVIII of the Constitution of Ohio, which became effective November 15, 1912, the council of said city passed an ordinance on the 25th of November, 1912, which was signed by the mayor on the 27th of said month, for the submission to the electors of said city of the question: "Shall a commission be chosen to frame a charter;" that at a special election held on the 4th of February, 1913, provided for by said ordinance, a majority of said electors voted on said question in the affirmative; that thereafter a commission chosen by the people prepared a charter for the said city, which was adopted by the electors on July 1, 1913, said charter being thereafter duly certified to the sec-

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retary of state; that by the terms of the charter it became effective for the nominating and electing of officers, and exercising the powers of the city as provided therein, from the time of its approval by the electors; that for the purpose of establishing departments, divisions and offices and distributing the functions thereof, and for other purposes, it shall take effect January 1, 1914; that since said 4th day of July, 1913, the date of said certificate, the provisions relating to the nomination and election of officers constitute the organic law of the city of Cleveland and supersede all provisions of general law enacted by the general assembly which conflict therewith; that the offices of city solicitor, city auditor and city treasurer, which are by statute elective, are made appointive by said charter, and that the charter provides for the election of a mayor at large and of councilmen from wards; that it provides that all ballots used in elections under the authority of the charter shall be without party mark or designation, and that the mode of nomination of all elective officers provided for by the charter shall be by petition; that full provisions are made in the charter for the nomination and election of officers for the city, for the signatures to the petition, the form of the petition, the filing of the same, the acceptance by candidates, the manner of voting, for the rotation of the names of candidates on the ballot, for space to write in names and for counting the ballots and determining results; that Section 16 of the charter provides that all elections shall be conducted and the results canvassed and announced by the election authorities prescribed by general law, and, except as

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otherwise provided therein, general laws shall control in all such elections.

The petition further alleges that notwithstanding the provisions of said charter the defendants below will accept nomination papers and make all provisions for holding a primary election for the nomination of candidates for elective municipal offices of said city which are provided for by the charter, on the first Tuesday after the first Monday in September, and a restraining order is asked against defendants to prevent them from holding such primary election.

It is further alleged that the holding of said primary requires the expenditure of public money.

To this petition the defendants below demurred on the ground that said petition does not state facts sufficient to constitute a cause of action.

The demurrer was overruled by the common pleas court and plaintiffs in error not desiring to plead further, final judgment was entered in favor of the defendant in error in accordance with the prayer of the petition.

The modifications which the charter makes in the election laws of the state are as follows: It abolishes nomination by direct primary and provides for the abolition of party mark or emblem on the ballot by which city officials are elected; also, instead of the names of candidates being arranged on the ballot in party columns, they are rotated on the ballot by the same method provided by state law for the rotation of names of candidates for judicial offices, boards of education and quadrennial appraisers; also, it provides for a system of preferential voting. This proceeding is brought to reverse the judgment of the court below.

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Mr. Timothy S. Hogan, attorney general; *Mr. Robert M. Morgan*; *Mr. N. J. Weisend*; *Mr. Frank Davis, Jr.*, and *Mr. Clarence D. Laylin*, for plaintiffs in error.

Mr. E. K. Wilcox, city solicitor, and *Mr. John N. Stockwell*, assistant city solicitor, for defendant in error.

JOHNSON, J. The question whether the city of Cleveland was empowered to provide in its charter a method of nominating candidates for elective offices, which is different from the method prescribed by the general assembly, involves the construction of Article XVIII and Section 7, Article V of the Constitution, both of which became effective November 15, 1912.

Pertinent parts of Article XVIII are as follows: "Sec. 3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

"Sec. 7. Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of Section 3 of this article, exercise thereunder all powers of local self-government."

In *State, ex rel. Toledo, v. Lynch, ante*, 71, it was held, that the provisions of Article XVIII continued in force the general laws for the government of cities and villages until the 15th of November, 1912, and thereafter, until changed in one of three modes: First, by the enact-

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ment of general laws for their amendment; second, by additional laws to be ratified by the electors of the municipality to be affected thereby; third, by the adoption of a charter by the electors of a municipality in the mode pointed out in the article. In that case it was held that no municipality was entitled to exercise the powers referred to in Section 3 until it had adopted a charter.

The people of the city of Cleveland having pursued the third mode pointed out, the question presented here is, whether or not it was within their power to include in the charter adopted a method of nominating candidates such as above referred to.

It is contended by plaintiffs in error that the office of a charter, referred to in Section 7, is merely to provide a form of government and not to prescribe any of its functions. When construed in connection with Section 3 and the rest of the provisions of Article XVIII, and in the light of the manifest objects sought to be attained by their adoption, we think there is no warrant for giving this limited meaning to the language.

McQuillin, in his work on municipal corporations, says at Section 320: "The word 'charter,' when used in connection with a municipal corporation, consists of a creative act and all laws in force relating to the corporation, whether in defining its powers or regulating their mode of exercise." Judge Dillon in his work on the same subject at Section 63 says: "The power and authority conferred by the constitution upon cities to frame their own charters extend to all subjects and matters properly belonging to the government

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of municipalities, and this necessarily includes any subject appropriate to the orderly conduct of municipal affairs."

The same proposition is declared and enforced in *Schigley v. City of Waseca*, 106 Minn., 94.

Under Section 7 the powers granted in Section 3 may be vitalized and made active. But, as in preparing a plan to accomplish any undertaking, the thing to be done, the purpose and scope of the plan, must be understood and defined before any adequate conception can be had of the instrumentalities necessary to carry out and accomplish the purpose.

The rational conclusion from our decision that Section 3 is not self-executing, but awaits the adoption of a charter, is that the charter should outline and define the scope of the plan referred to.

Under Section 3 municipalities have authority to exercise "all powers of local self-government" subject to the limitations stated in said section and in other parts of Article XVIII, which we will notice later on.

As to the scope and limitations of the phrase "all powers of local self-government," it is sufficient to say here that the powers referred to are clearly such as involve the exercise of the functions of government, and they are local in the sense that they relate to the municipal affairs of the particular municipality.

It will not be disputed that one of the powers of government is that of determining what officers shall administer the government, which ones shall be appointed and which elected, and the method of their appointment and election. These are

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essentials which are confronted at the very inception of any undertaking, to prepare the structure or constitution for any government. Obviously such power would be included among "all powers of local self-government," which any municipality has authority to exercise under Section 3 of Article XVIII as to any officers of such municipality, unless the election of such officers is not a matter of municipal concern, or unless such power has been excepted in some manner from those granted.

Provisions similar to those found in Article XVIII of the Ohio Constitution as amended have been adopted by other states, although the grant of power is not so comprehensive in some, and in some of them there are greater restrictions than those found in Article XVIII.

In *State, ex rel. Duniway, v. City of Portland*, 133 Pac. Rep., 62, decided May 28, 1913, in which a kindred question to the one involved here was before the court, they say: "Municipal elections and the choice of municipal officers are matters of purely municipal concern; and, as to these, the people of the city have ample power to legislate, subject only to the restrictions heretofore noted."

So in *People, ex rel., v. Worswick*, 142 Cal., 71. The provision of the constitution of California in effect at the time of the adoption of the charter was as follows: "Sec. 6, Article XI. Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns. * * * and cities and towns heretofore or hereafter organized, and all charters

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thereof framed or adopted by authority of this constitution, *except in municipal affairs*, shall be subject to and controlled by general laws."

The charter having included a provision as to registration, it was claimed that it conflicted with the general laws of the state and that registration was a matter subject to and controlled by general laws. The question was squarely made, therefore, as to whether such provision of the charter was a municipal affair within the meaning of the section of the constitution above quoted. The court say: "Indeed, the general laws of the state touching the registration of voters prior to state and county elections have no bearing on an election of city officers in a municipality governed by a freeholders' charter, except so far as they are adopted by the charter itself. It is conceded that the election here in question was a 'municipal affair,' and, of course, the city could have adopted any system of registry, or could have declined to have any at all."

In *Socialist Party v. Uhl*, 155 Cal., 776, the constitutionality of a primary election law was involved. The statute exempted from its operation nominations to be held in municipalities which had adopted charters prescribing other methods. The statute was attacked on the ground that the exemption of the chartered cities made it not of uniform operation and therefore in violation of the constitution, the claim being that primary elections were state affairs and not municipal affairs. The court in the syllabus held: "So far as municipalities are concerned, the law stands the same as any other general law which, under

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Section 6 of Article XI of the Constitution, is not binding upon a municipality as to matters which are strictly municipal affairs. The election of municipal officers is strictly a municipal affair."

In *Mitchell v. Carter*, 31 Okla., 592, the city of Guthrie provided by charter for a ballot which should not contain any designation of parties but upon which the names of candidates should appear in alphabetical order. The court say: "It is further contended that the charter election law is in conflict with the general election law, in that the latter does not provide any means for placing upon the ballot the name of a nonpartisan candidate. That the election of municipal officers is strictly a municipal affair seems to be sustained by authority."

In *Graham v. Roberts*, 200 Mass., 152, the question of the local character of a provision changing the method of electing city officials in the city of Haverhill was involved, and the court say: "This was a matter of local concern, which is an exception to the rule that general legislative authority cannot be delegated."

It is clear upon reason and authority that municipal elections are and should be regarded as affairs relating to the municipality itself, and, in the absence of fundamental limitations prohibiting, are things that may be provided for by the local government. This does not involve the loss by the state of its proper authority within the city.

It is true, as contended, that the state at large is interested in the purity of every election, municipal or otherwise, and is interested in making

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provisions fixing the qualifications of electors and for the preservation of the purity of the ballot effective throughout the state, but the state is likewise interested in the protection of every other right of the citizen and should and will throw around all of these rights every protection which can be afforded by the sovereign power. The state itself is interested in protecting the municipality in the exercise of every right and power granted to it by the constitution. Every energy of the state, executive, legislative and judicial, may be properly invoked and will respond to the protection of such rights.

But it does not follow from this that the state would or could interfere with the exercise of the powers of local self-government which the people of the state had conferred upon the municipality by their constitution. The method of electing municipal officers would seem to be a matter peculiarly belonging to the municipality itself. The very idea of local self-government, the generating spirit which caused the adoption of what was called the home-rule amendment to the constitution, was the desire of the people to confer upon the cities of the state the authority to exercise this and kindred powers without any outside interference.

As stated, there are some limitations in Article XVIII on the grant of "all powers of local self-government." There are provisions that laws may be passed to limit the power to levy taxes and incur debts for local purposes; to require reports from municipalities as to their financial condition and transactions; to make examinations of books and

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accounts of municipal authorities and public undertakings conducted by such authorities.

There is also in Section 3, after the grant of authority to exercise all powers of local self-government, the limitation involved in the language, "and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

The inclusion of these limitations in Article XVIII is a conclusive indication that the convention which framed it was conscious of the wide scope of the powers which they were conferring upon the cities of the state with reference to their local self-government.

Not alone this, but in connection with the comprehensive grant they disclose the intention to confer on municipalities all other powers of local self-government which are not included in the limitations specified. *Expressio unius exclusio alterius est.*

There is a further provision found in Section 14 of Article XVIII, pertinent parts of which are as follows: "All elections and submissions of questions provided for in this article shall be conducted by the election authorities prescribed by general law."

The elections and submissions of questions provided for in the article are: First, the submission to the electors of the municipality of "additional laws" passed by the general assembly; second, the submission of the question of acquiring public utilities; third, the submission of the question, "Shall a commission be chosen to frame

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a charter;" fourth, the election of the charter commissioners on a ballot bearing no party designation; fifth, the submission of the approval of the charter; sixth, the submission of the question of any amendments.

If the constitutional convention had intended that the election of all municipal officers should be conducted by the methods prescribed by general law, it is natural to suggest that so important an exception to the grant of all power of local self-government would have been included in the article.

It will be noted that the language of Section 14 is not that the elections referred to shall be conducted according to the methods prescribed by general law, but shall be conducted by the election authorities prescribed by such law.

A consideration of Section 8 of Article XVIII strengthens our view in connection with this distinction. Section 8 provides for the submission of the question, "Shall a commission be chosen to frame a charter;" and provides that the ballot containing such question shall bear no party designation, and provision shall be made thereon for the election from the municipality at large of fifteen electors who shall constitute the commission, provided the electors voting in the affirmative are in the majority.

Section 5 provides for the holding of elections as to acquiring public utilities. All of these elections and submissions of questions are required by Section 14 referred to, to be "conducted" by the election authorities prescribed by general law, but in accordance with the method referred to in the article.

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Section 16 of the Cleveland charter itself provides that all elections shall be conducted, etc., by the election authorities prescribed by general law; and plaintiffs concede that in the matter of providing what officers shall be elected the provisions of the charter shall control the election board.

This brings us to a consideration of Section 7 of Article V, which it is contended applies in this case. The pertinent part of that section is as follows: "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator; but direct primaries shall not be held for the nomination of township officers or for the officers of municipalities of less than two thousand population, unless petitioned for by a majority of the electors of such township or municipality."

It will be remembered that this section and Article XVIII were adopted as amendments to the constitution on the same day. By that adoption they became parts and provisions of the same instrument. There are well-established rules by which they must be weighed. They must be construed together and effect must be given to both. Differences, if there are any, must if possible be reconciled. As stated in Cooley on Const. Limitations (7 ed.), p. 92: "One part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together." The mandate in Section 7, Article V, is to provide by law for the nomination

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by primary or by petition of all elective *state, district, county and municipal* officers. Such a law applying throughout the state to all of the officers named must of course be passed by the general assembly, and will therefore apply uniformly throughout the whole state and to every municipality which has not taken the steps pointed out in the Toledo case to "secure immunity from such general laws."

It must be remembered that any statute passed under Section 7 of Article V, which provides by law for nomination, by primary or by petition, of all elective state, district, county and municipal officers, is a general law. But this general law passed under this provision must yield to a charter provision adopted by a municipality under a special constitutional provision, which special provision was adopted for the purpose of enabling the municipality to relieve itself of the operation of general statutes and adopt a method of its own to assist in its own self-government, and which charter when adopted has the force and effect of law.

Of course such a charter provision must be one which the municipality was authorized to adopt under the grant of authority to exercise all powers of local self-government. We have seen that the method of electing officers is a governmental function or power, and when the officer to be elected is chosen solely for the performance of a municipal duty, it is a municipal affair.

The provision of a charter which is passed within the limits of the constitutional grant of

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authority to the city is as much the law as a statute passed by the general assembly. The constitution of California contains a provision with reference to the deposit of public moneys by which it is provided that any moneys belonging to the state or any county or municipality within the state, may be deposited in any national bank or banks within the state, or in any bank or banks organized under the laws of the state, in such manner and under such conditions as may be provided by law. The legislature passed a law providing for the deposit of public funds of a municipality in any licensed national bank or banks within the state, but the charter of San Francisco prohibited any such deposit. In an action to enjoin the treasurer of the city from depositing the city's money in a bank, the court, in *Rothschild v. Bantel*, 152 Cal., 5, say: "It is unnecessary to cite authorities to the well-settled proposition that under the 'municipal affairs' amendment to Section 6, of Article XI of the Constitution, adopted in 1896, provisions in a freeholders' charter of a municipality as to municipal affairs are paramount to any law enacted by the state legislature, and that the legislature is without power to enact any law infringing thereon. * * * In such a case the charter provision is the 'law' referred to in the constitutional provision. The provision is not that the deposit may be made in such manner and under such conditions as may be provided by the legislature, or by any particular kind of law, but is simply 'as may be provided by law.'"

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In *State, ex rel. Duniway, v. Portland, supra*, the court say: "Section 16 of Article II of the Constitution as amended June 1, 1908, among other things, provides: 'Provisions may be made by law for the voter's direct or indirect expression of his first, second or additional choices among the candidates for any office.' Now a city charter enacted by the voters of the municipality is as much a law as if it were enacted by the legislature. A provision, therefore, made in such charter for the expression by the voter of his first, second, or third choices among the candidates for any office is a 'provision made by law' for that purpose, and within the constitution."

This proposition is also upheld in *People, ex rel., v. Williamson*, 135 Cal., 415; *Grant v. Berrisford*, 94 Minn., 45; *State, ex rel., v. District Court of Ramsey Co.*, 87 Minn., 148; *Kansas City v. Marsh Oil Co.*, 140 Mo., 458.

Even if it be conceded that Section 7, Article V, applies to nominations for officers in cities which have adopted charters, a charter which provides for such nomination by petition is a compliance with the requirement of that section. The section does not require that any particular form of petition shall be provided.

We remark as to Section 7, Article V, that it became effective January 1, 1913. Pursuant to its requirement, the legislature passed a law approved May 3, 1913, providing for nominations by primary election, or by petition, of all state, district, county and municipal officers excepting in municipalities of less than two thousand popu-

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lation. By the terms of the law it does not become effective until January 1, 1914. Therefore, there is now no law passed by the legislature in effect, under Section 7, Article V. But it is contended that the provision of the Cleveland charter in question is obnoxious to the provisions contained in Section 3, Article XVIII, viz., "may adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." because it conflicts with the primary election laws in existence on January 1, 1913.

It is urged that the "general laws" referred to are all laws that may be passed in the exercise of the police power, and it is claimed that the nomination of candidates for public office is a matter to be provided for in the exercise of that power.

Our attention is called to the case of the *State, ex rel., v. Felton*, 77 Ohio St., 554. In that case the validity of Sections 2916 *et seq.*, as amended April 20 and 23, 1904 (97 O. L., 107, 439), was attacked. The statute provided that when any voluntary political party in any county, township or municipal corporation, by a vote of a majority of its controlling committee shall cause notice of the holding of a primary election and shall make application to the deputy state supervisors and inspectors of elections, or other proper board, such primary election shall be held under the provisions of this act.

The whole proceeding in its inception was the voluntary act of the political party. No party was compelled to nominate its candidates under this

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law, but could nominate in its own way if it desired. The court sustained the validity of the statute on the ground that a party having decided to nominate its candidates in the manner referred to, the proper conduct of the primary was a matter that concerned the general welfare, and that in the exercise of the police power the legislature might make such reasonable regulations as would safeguard and keep the primary free from fraud. The court say at page 580: "Our statutes are not mandatory. The statute, so far as present legislation goes, only consents upon request by a political party to supply the facilities for holding the contest in the party and to act as umpire." It was in nowise the purpose of the statute involved in the Felton case to prescribe and enforce a method, but merely to furnish the facilities to assist recognized and organized portions of the citizenship to have their own method accomplished in keeping with decency and the good order of the community.

As we have already pointed out in this opinion the prescribing and defining of a system or method for the nomination and election of officers is a governmental function, and involves the exercise of political power.

Provisions for safeguarding the method are within the police power. In Freund on Police Power, Section 3, it is said: "From the mass of decisions, in which the nature of the power has been discussed, and its application either considered or denied, it is possible to evolve at least two main attributes or characteristics which differentiate

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the police power; it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." And at Section 22: "The police power restrains and regulates, for the promotion of the public welfare, the natural or common liberty of the citizen in the use of his personal faculties and of his property. The state may also promote the public welfare to the use of what we may call its corporate capacity. This capacity belongs to the sovereign state as a matter of course, so that it may hold and dispose of property, make contracts, employ agents or servants, and sue; and it may be bestowed by it upon subordinate political divisions like counties, cities, school districts, etc."

The system or plan to be followed in the nomination and election of the officials of any city is only of interest and concern to the people within the limits of the city, and when governmental powers have been conferred upon the city, it acts within its authority when it adopts its own plan, provided it violates no constitutional requirement. Cases cited in the briefs show that the exercise of eminent domain, that rules for assessments on private property for public improvements and that conditions imposed concerning suits for damages, have all been sustained under charters providing for local self-government.

Section 4963, General Code, which was in effect prior to the adoption of the amendment, Article V, Section 7, reads as follows: "Primaries under this chapter to nominate candidates for county offices or to select delegates to nominate candidates

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for state or district offices, shall be held in each county at the usual polling places on the third Tuesday of May of even-numbered years, and primaries held to nominate candidates for township and municipal offices, justices of the peace and members of the board of education shall be held in each county at the usual polling places on the first Tuesday after the first Monday in September of odd-numbered years."

That section is repealed by the act referred to, *supra*, which will be in effect January 1, 1914.

It will be noted that Section 4963 and cognate sections do not provide for nominations by direct primaries of candidates for state and district offices, but do provide for such nominations of candidates for county offices and for all municipal offices.

The schedule, adopted at the time the amendments were, provides that they shall be effective January 1, 1913, and that all laws not inconsistent therewith shall continue in force until amended or repealed.

This law, therefore, as to state and district officers and as to cities and villages of less than two thousand population, is invalid because inconsistent with Section 7, Article V of the Constitution.

But assuming that this law, invalid in so many important parts, is still effective as to the portions not thus impaired, it is simply a general statute of the state, and could in no sense be held to supersede the provisions adopted by the city of Cleveland in its charter in compliance with the fundamental law.

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Concerning the provision in Section 3, Article XVIII (may adopt such local police, sanitary and other similar regulations as are not in conflict with general laws), the general laws referred to are obviously such as relate to police, sanitary and other similar regulations, and which apply uniformly throughout the state. They involve the concern of the state for the peace, health and safety of all of its people, wholly separate and distinct from, and without reference to, any of its political subdivisions—such as regulate the morals of the people, the purity of their food, the protection of the streams, the safety of buildings and similar matters.

Manifestly, therefore, it was necessary, when the constitutional convention was conferring all powers of local self-government on cities, to provide that, in the adoption of such regulations by any city for itself (police, sanitary and similar ones), they should not conflict with general laws on the subject.

It is a well-settled rule that the body adopting amendments, such as are here involved, will be presumed to have had in mind the course of legislation and existing statutes touching the subjects dealt with. *People, ex rel. Jackson, v. Potter*, 47 N. Y., 380, and cases cited. The legislature of Ohio in the codifications adopted by it, covering many years, including the last one adopted, has included a separate title, designated by it "*Police Regulations*," in which it has included the general laws of the character we have above described. If it had been intended that the limitation should comprise the wide and elastic scope contended for, it would have been so expressed.

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We think it clear that the regulations referred to in Section 3 are such and such only as we have indicated, and that it would be contrary to the import of the language and to the intent of the framers of the amendment to hold that by this clause there is denied to cities the authority to adopt charter provisions concerning the manifold subjects within the field of proper municipal activity, unless they are "not in conflict with general laws" on the subjects proposed to be dealt with.

Such a holding would disregard the purpose of the people in making the amendment. If the construction indicated is a correct outline of the extent of the authority conferred in Article XVIII, then the constitutional grant would seem to be a vain and empty thing, of no actual value.

There has been a new distribution of governmental power. The distribution has been made by the people. This court held in *Cass v. Dillon*, 2 Ohio St., 608, "The constitution did not create the municipalities of the state, nor does it attempt to enumerate their powers." But during the life of the constitution of 1851, until the amendments, our cities exercised only such powers as were granted to them by statute. All agree that Article XVIII was adopted for the purpose of changing that condition and of materially adding to the governmental status and power of our cities and villages.

And yet under legislative control they had as much real power as is conceded to them by the construction contended for, by which they would be compelled to run all of their acts in the channels fixed by the general assembly.

Opinion of the Court.

The experiences which created the public sentiment that led to the adoption of this amendment are well understood and they are not confined to Ohio.

The admiration that has been everywhere excited for the work of the founders of our national and state governments has been justified by their service.

The general powers of each were well defined. But the municipal governments were not so favorably initiated or developed.

Existing before the institution of our system and without any constitutional definition of their powers, they fell by a sort of passive consent, and because it was deemed wise, under the control of the state legislatures.

The ever-increasing needs and importance of urban populations were attended by a remarkable series of legislative makeshifts in the effort to meet these conditions, with results not at all satisfactory.

It would seem to be evident that the administration of municipal affairs is a matter that is purely practical and local, wholly without important connection with the policies, partisan and otherwise, which naturally affect the operations of the national and state governments, but by reason of the procedure followed the government of cities has been largely determined and controlled by these extraneous influences.

Inefficiencies and imperfections of admitted and disquieting importance have long been too apparent in the conduct of these local affairs of the people.

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That which is called the municipal problem is and has been for many years a matter of serious concern to students of our institutions. It is natural that these imperfections and inefficiencies should be attributed to the system under which they have occurred, and it is also natural that the people should desire to try the experiment of bringing these governments closer to themselves.

However, the business of the court is to ascertain from these amendments what the people intended by their adoption—what changes have been made. Their wisdom is not the concern of the court. Impressed with these admonitions we have arrived at the result stated, and the judgment will be affirmed.

Judgment affirmed.

WANAMAKER and WILKIN, JJ., concur.

SHAUCK, DONAHUE and NEWMAN, JJ., dissent.

WANAMAKER, J., concurring. In the main I heartily concur in the opinion by Judge Johnson in support of the judgment of this court. There are, however, additional reasons that to my mind are not only pertinent but paramount in arriving at a just and sound conclusion in this case. These I shall briefly set forth in the following opinion:

“Municipalities shall have authority to exercise *all* powers of *local* self-government”—this is the cornerstone of home rule for Ohio cities. Section 3, Article XVIII, Ohio Constitution 1912.

Any farmer, workingman, business man, banker, physician, clergyman or any layman with average intelligence in English, understands the clear,

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comprehensive and complete grant of power included in the above words. Some lawyers and judges seem to have serious doubt about it.

However, if these words stood alone the opposition reluctantly concede that their scope and dimensions would allow the city of Cleveland under its charter the right and privilege of selecting its own officers in its own way.

Certainly to the average mind "all powers" of local self-government means "all powers." It is hard to realize that "all" may mean only "some," "part," "a fraction" or anything less than "all." The words are so simple and so clear in the general grant that there is neither right nor occasion for doubt or interpretation.

The opposition to the city's right under its charter so to select its own officers have abandoned all objections hitherto urged save that the general sweeping grant of power expressed in the words "municipalities shall have authority to exercise all powers of local self-government" is cut down by two qualifications or limitations in the constitution itself: First, the last half of Section 3, Article XVIII, which reads: "and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws;" and second, Section 7, Article V, "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections *or by petition as provided by law,*" etc.

Now to the first objection. In every municipality there are three kinds of governmental power now being exercised: federal, state and

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municipal. The federal power of the nation is and of right ought to be supreme in its own proper jurisdiction. The state power of the state is and of right ought to be supreme in its own proper jurisdiction. Why should not the municipal power of the municipality be substantially supreme in its own proper jurisdiction? I contend that was the purpose of the constitution makers and adopters. Did they utterly fail in that purpose?

These powers are usually clearly distinguishable. At times, of course, between the state and the nation, as it is between the city and the state, there may be a twilight zone where it is difficult to distinguish into which class the governmental power falls. Nevertheless there is abundant reason and authority for such inherent distinction.

The federal power with its limitations was put in the federal charter, to-wit, the national constitution. The state power with its limitations in the federal charter and state charter was put into the state constitution. The municipal power is now to be put in the municipal charter, which is to be the constitution of the city, limited only by its own provisions and by the state and federal charters or constitutions.

The federal government has no right to exercise a state or a municipal power any more than a municipal government has a right to exercise a state or national power, unless the same shall be specially conferred by some constitutional grant or statutory enactment pursuant thereto.

The first half of Section 3, Article XVIII, known as the home-rule amendment, clearly refers to nothing but municipal powers when it says:

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"Municipalities shall have authority to exercise all powers of local self-government."

The last half of Section 3, Article XVIII, is as follows: "*and* to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." It is contended that this last half cuts down or subtracts from the grant of power in the first half.

Now if I understand the conjunction "*and*" it means addition, not subtraction. One of the first lessons of the child in simple arithmetic is put on the blackboard thus: 5 and 4 equal 9. Suppose the teacher taught the child that 5 and 4 equal 1, on the ground that "*and*" meant to cut down or subtract, how long would the teacher hold his job? And yet this theory is just as tenable as to say that the second half of Section 3 beginning with "*and*" cuts down or subtracts from the first half.

The first half relates wholly to municipal power. The last half relates wholly to state power. The first half is as unlimited as the second half is limited. The second half could not possibly relate to municipal power, because the first half is as comprehensive as a grant of power could be and therefore no addition could be made to it.

If it be claimed that "not in conflict with general laws" as found in the second half modifies also the first half, then it must follow that all municipalities are as absolutely under the control and domination of the state legislature to-day as they were before the adoption of the home-rule amendment, because all general laws now on the statute books would be preserved, and future

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legislatures might proceed with municipal legislation at their pleasure. Home rule would be but an empty eggshell, a mere snare and ideality.

However, it is claimed that the matter of providing how nominations shall be made in municipalities is the exercise of police power, and therefore the charter as to primaries and elections, being a local police regulation, must not conflict with general laws.

Some things, however, are admitted in this case. They have passed beyond the range of doubt or dispute: (1) That the municipality may under the home-rule amendment determine its own form of government; (2) it may determine its own officers; (3) it may determine their duties and powers; (4) it may determine whether they shall be appointed or elected; (5) it may determine the term of office, salary, etc.; (6) it may provide the right to recall such public officers. All minds meet upon these admissions as being within the scope and spirit of the home-rule amendment. If this be true, then certainly these powers are not within the police power of the state or else they too are subject to the general law as contended for by the opposition.

If these be not police powers, how can it be seriously and sensibly contended that the powers in question are police powers? How do they differ in their first or last analysis?

If the city through its charter might determine the above matters for itself, it seems a sheer subterfuge to say that they may not determine how they shall nominate their own officers and how they shall elect their own officers.

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As a matter of fact, none of these powers are police powers either in common parlance or constitutional phrase, but instead they are merely political or governmental powers, elementary and primitive, because they must first be created and exercised before the municipality may perform any of its most important functions.

I am aware that some decisions are to the contrary, but no doctrine is so dubious, no assertion so absurd, but that some case may be found somewhere and somehow to support it.

The case much relied on to support this doctrine of police power as overruling the provision of the charter in question is the case of *State, ex rel., v. Felton et al.*, 77 Ohio St., 554. The first section of the syllabus reads as follows: "The nomination of party candidates for public office concerns the public welfare and the legislature in the exercise of the police power may make reasonable regulations therefor." The case in question involved an act of the legislature providing for primary elections by political parties, the contention being that such legislation was unconstitutional. The court sustained the legislation. That was under the constitution of 1851. It was the exercise of a state power in a state matter. The direct question was not before the court as to classifying the power exercised by the legislature, whether it was a purely governmental or political power, or whether, on the other hand, it was a police power. The court, however, has indicated its own view by designating it as a police power. I respectfully disagree with the opinion of the court in that case. Restraining or regulatory provisions touching

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primary elections or general elections may be enacted to promote the public peace, or to prevent political fraud or to punish the offenders, but such would be merely incidental to the general act providing for primary elections.

Now as to the second and last objection that is seriously urged why the charter is invalid, to-wit: Because it is in violation of Section 7, Article V, known as the direct primary amendment. I adopt the language of Judge Johnson in this behalf and add the following:

In interpreting any new amendment the well-known Blackstonian rule of construction must be applied: First, what was the old law; second, what were the mischiefs complained of; third, what remedy was intended to be provided under the new?

It is unnecessary here to repeat my views on home rule under this amendment as set forth in the Toledo home-rule case, decided May 6, 1913, *State, ex rel. Toledo, v. Lynch, Auditor, ante*, 125.

My view on the history of municipal government in Ohio is therein very fully set forth and I have no disposition to repeat it here, though much of it applies to the case at bar. Suffice it to say that home rule for cities and villages existed in Ohio before we had a state and existed in America before we had a nation.

The right of local self-government was recognized as an inherent, inalienable right by the fact of its general existence and the utter absence of any surrender of such right in the state constitution of 1802, which did not even name cities, villages or municipalities.

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Every municipality was a law unto itself until after the constitution of 1851, when the legislature assumed and usurped full and complete authority in governmental powers over municipalities, and that, too, without any sanction or grant express or implied in said constitution. This assumption of power, this usurpation of authority, was sanctioned by our courts by holding that municipalities have only such power as is expressly conferred upon them by the state legislature, or such powers as are necessarily implied to carry such express powers into effect. This was not only judge-made law but was judge-made constitution, without either authority of common sense, common law or constitution.

Now this resulted in government of cities by the general assembly of Ohio, and the general assembly was generally governed by the party boss or machine, with its allies of special privilege and public franchise interests. By ripper and special legislation they could exploit the cities at their own pleasure; the local bosses in league with the state bosses held the citizens and taxpayers of the city at their mercy.

To get rid of the state political bosses at Columbus who controlled the legislature, to get rid of the party bosses at home, the citizenship long demanded the right of nonpartisan nomination, election and public service in their own city governments.

They had already successfully accomplished this in the nomination and election of members of the school board. They had already accomplished the nonpartisan election of all their judges. They had

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already successfully accomplished the nonpartisan nomination and election of delegates to the constitutional convention. They had already successfully acquired the right of nonpartisan nomination and election of charter commissioners. Now the people wanted to nominate and elect their own municipal officers, with reference to their personal fitness, their business qualifications and their experience in the public service, equipping them for the respective municipal offices. The people believed that the qualifications for successful service in public corporations were practically identical with qualifications for successful service in the private corporations.

They believed they had been duped long enough by the stratagems and spoils of the boss. The party lash had been employed and cracked long enough by these patriotic, high-minded bosses demanding that the local candidate for mayor or councilman on the Republican ticket, or the Democratic ticket, be elected for the "grand old party's sake;" that the party's salvation no less than the nation's salvation depended upon the election of a Republican or a Democratic mayor or councilman.

Party labels and party emblems had become ridiculous in local affairs and the people had grown tired of voting for mere party birds, whether eagles or roosters, and they wanted a chance to vote their beliefs by voting for candidates solely for personal fitness for local reasons and conditions, with a view of getting the most equitable, economic and efficient public service.

What matters what the candidate's views on the Philippines, the Panama canal, the tariff or the

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currency system? The test should be: What does he know about the needs of the city and its problems, its law and order, its public health, its highest and most general welfare, and what is his capacity, his common sense, and his courage to give expression to the best public will and judgment in this behalf?

Accordingly the people demanded of the constitutional convention: (1) Emancipation from legislative domination and dependence; (2) emancipation from state and party bosses; (3) nonpartisanship in all purely municipal matters.

That is what they asked for and that is what the constitutional convention evidently tried to give them. Shall they now be deprived of this long-struggled-for freedom from blind and corrupt partisanship by the judgment of this court?

Having now discussed the primary and paramount purposes of this new home-rule amendment, let us see whether after all there is any conflict between the terms and provisions of the primary amendment and the home-rule amendment.

The part of the primary amendment in question reads as follows: "Section 7, Article V. All nominations for elective state, district, county and municipal offices *shall be made at direct primary elections or by petition as provided by law.*" Now the Cleveland charter makes all its nominations by petition, which enables them to be free from party domination, free from boss control, by cutting out of its charter party primaries. Of course, this freedom from party domination will not be accomplished in a day; but the people are at least provided with the tools to effect it by and by.

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The layman reading this language would at once say that either one of two methods for making nomination of municipal officers was here authorized when so provided by law: the one, direct primaries, the other, by nominating petitions; but that it was for a law duly enacted after the passage of this amendment to determine which method should be adopted and the necessary legislative regulations therefor.

Manifestly this provision of the constitutional amendment is not self-executing. Legislation in some form is needed. Suppose the legislature were to make no provision whatsoever for primary elections, but did provide for all nominations by petition for state, county, district and other offices. Does any one seriously doubt that under this amendment such legislation would be constitutional?

The purpose of this amendment was to abolish the old packed caucus and boss-controlled convention and give the people equal chance to vote by ballot for the various candidates for nomination, and that by either route, primary or petition, as the law should provide.

The opposition, however, contend here that "or" should be read "and." They are right, in order to carry out the construction of this amendment they claim for it. But what right, pray, has any court to read "or" as "and?" It is presuming a good deal to say that the constitutional convention did not know that "or" is always used in the alternative and "and" in the conjunctive. If they had meant "and" I think it may fairly be presumed that they were intelligent enough to have used

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"and," and of course if "and" had been used the claims of the opposition could be more favorably considered.

Cases have been cited in which the courts have held "or" the equivalent of "and." But this would be judicial legislation of the most aggravated character, and would arouse the deserved contempt of our independent and intelligent citizenship.

It is claimed that "as provided by law" means state law; general-assembly law only.

Inasmuch, however, as the purpose of the home-rule amendment was clearly and certainly to make the charter the supreme law of the city as to municipal matters, therefore it must follow that the charter is a law for the city quite as much as an act of the general assembly is a law for the state.

Judge Johnson has very fully handled this question in his opinion and cites the big fact that the supreme courts of all the states that have adopted the home-rule provisions by charters have held the provisions of the charter quite as much within the words "provided by law" as any act of the state legislature.

One more analogy that seems to me conclusive on the questions at issue.

Section 2 of the home-rule amendment, Article XVIII, reads as follows: "General laws shall be passed to provide for the incorporation and government of cities and villages," etc.

Section 7, Article V, as to primary elections, reads as follows: "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections *or* by petition as provided by law," etc.

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All concede that the adoption of a charter by a city withdraws that city from the "general laws" for the "government of cities and villages" provided for in said Section 2. If it be not so the general laws could at any time nullify the charter and home rule would be only a pretty platitude.

If the force of the charter *ipso facto* withdraws the city from the general law as to "government," how can it be said that that same charter does not withdraw the city from each fractional part of government, such as a primary nomination or election?

The language of Section 2 is much more comprehensive than the language of said Section 7. If the whole be greater than any of its parts then when we have the withdrawal from the whole of government it must likewise follow that there is a withdrawal from each and every one of its parts.

Boiled down, what possible interest could the state have in the method by which the city should nominate and elect its own officers, officers that have nothing to do with anything but purely municipal affairs? Who, outside the city, could have any interest in or objection to such plan but the political boss and his allies?

The will of the dead man controls the disposition of his property. The will of living men should control the disposition of their power as expressed through their constitution. The will of the constitution makers as to the home-rule amendment is quite apparent and familiar to all our people.

It is high time to construe our constitutions in the interests of a people's government instead of a party government. It is time that the declara-

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tion: "All political power is inherent in the people" be made good. It is time that the constitution be interpreted to shield the people's power and the people's property rather than to exploit them for the benefit of the political boss and the party machine. The people of a city cannot get real efficiency in the public business until they get real emancipation from the party boss.

WILKIN, J., concurring. On the first day of July, 1913, the city of Cleveland adopted a charter for its government, under favor of Sections 3 and 7 of Article XVIII of the revised Constitution.

By the provisions of the charter the people of Cleveland have abolished nominations for city offices by party primary elections, have ordained that nominations for all elective offices shall be by petition, and have adopted for municipal elections the nonpartisan preferential ballot. The secretary of state and the attorney general question the power of the city to do either of these things. Therefore they advised the board of deputy state supervisors and inspectors of elections of Cuyahoga county to proceed as prescribed by the General Code with party primary elections for the nomination of candidates for the elective municipal offices of Cleveland, to print the names of candidates so nominated on the ballots under party designations and emblems, and to hold the election for municipal officers according to the general laws of the state.

The city sued out of the court of common pleas of Cuyahoga county a restraining order, which upon demurrer was made perpetual, and to this decree error is presented directly to this court.

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The question we have to consider is, whether the city of Cleveland is authorized by Article XVIII of the Constitution, known as the home-rule amendment, to adopt its own method of nominating and electing its municipal officers, or must it nominate and elect its city officers in the method prescribed by general law. In other words, may the electors of Cleveland, having adopted a special charter for the government of their city, nominate candidates for elective offices by petition alone and vote without distinction of party their first, second and other choices amongst such candidates for the respective offices, upon what is known as the nonpartisan, preferential ballot? Or must they have direct primary nominations of party candidates for such offices, and each voter designate, as his first and only choice for each office, the name of one of the several candidates whose names appear on the so-called Australian ballot in parallel columns bearing the title and emblem of the respective political parties which present candidates for such office? In short, does the reformed Constitution of Ohio require free-charter cities to conduct their nominations and elections of municipal officers in the same general mode which the statutes of the state define for state, county and non-charter municipal offices? Or does the constitutional grant of all powers of local self-government to free-charter cities exclude from this grant of self-government the right of choosing their own method of nominating and selecting the local agents and officers who shall administer the affairs of the municipal government?

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The controversy turns upon the construction of three sections of the recent amendments to the constitution, to-wit:

Article XVIII, Section 3. Municipalities shall have all the powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws. Section 7. Any municipality may frame and adopt * * * a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.

Article V, Section 7. All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law, and provision shall be made by law for a preferential vote for United States senator.

The first proposition on behalf of the state is that the city's exercise of all power of local self-government is limited by the concluding clause of Section 3, viz: "*as are not in conflict with general laws*;" that the method of nominating and electing municipal officers, as defined in the provisions of the Cleveland charter, is another and a different method from that defined in the General Code; therefore these provisions do conflict with general laws, and are not included but expressly excluded from the grant.

On the part of the city the contention is that the limitation is upon "*such* local police, sanitary and other similar *regulations*, *as* are not in conflict with general laws." Manifestly this is the correct grammatical interpretation, for "*such*" and "*as*"

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are relative words, and by the laws of the language they require the limiting clause to be construed with the substantive word "regulations" to which they belong. That is to say, the *regulations* must be *such as* are not in conflict with general laws, but all the powers of *local self-government* other than police, sanitary and similar regulations are unlimited.

Counsel for the state shift from grammatical interpretation to logical construction upon the word "police." They say police power is one of the inherent powers of government, necessary to the existence of the state, which was not intended to be delegated to the municipality. The city admits the truth of this statement as to the general police power of the state. That power is and must be reserved to the state; but the police power here conferred on the city is the *local police* power. The election of municipal officers is purely an affair of local government. If the city is to govern *itself*, certainly it must be free to choose its own method of selecting the city's agents to perform the municipal functions, for the people of a city of 700,000 souls cannot act *en masse*; they must act by representation. If the representatives of the state in general assembly may prescribe the mode of selecting the mayor and council of the city by party caucus, primary and ballot, and since the mayor, under the charter, appoints the city solicitor, city treasurer and all the heads of the other departments of government, and the council makes the local laws, then the city will soon be as completely under domination of party bosses and their pliant minions as politicians could wish.

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In this case we have a document promulgated by a popular assembly; its language is the language of the people, for the people. They expect it to be applied to the affairs of state as plain men understand it. If the instrument of the popular will is not thus expounded, the hope of the people will be disappointed; many a good man's faith in our courts and our democratic institutions will be shaken. This is an evil to be avoided, worse than finding an incongruity, or even a contradiction, between a phrase in one part and a germane clause in another part. It were better to let the state hobble along with a defective instrument till the defect can be repaired, than to impair the confidence of the people in our courts and our system of constitutional government. A plausible construction to harmonize conflicting parts, however honestly made, which disappoints the purpose of the people who confirmed and established the writing, will not minimize the disgust of sensible men nor palliate the wrong done to the public conscience. Let the flaw in the structure of the revision be conceded, if there is one (and there seems to be), but let the new device have free play according to the manifest will of the people. It will serve the state far better so, than if we ignore the good intentions of practical men and attempt to mend it by legal construction and conjecture, and thereby defeat its purpose even but slightly. If we but seem to substitute our wisdom for theirs, we may hurt the cause of good government rather than help it. Ex-President Judge Wm. H. Taft at the meeting of the American Bar Association three weeks ago, used these words: "It is nearly as

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essential to give the appearance of doing justice as it is to do substantial justice * * * in order for the courts to achieve their highest usefulness * * * in securing tranquillity and voluntary acquiescence in the existing order."

The question is, What did the people mean when they ordained home rule for cities? Their language is found in the third and seventh clauses of Article XVIII:

"3. Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are *not in conflict with general laws.*"

"7. Any municipality may frame and adopt a charter * * * and may, subject to the provisions of Section 3, exercise thereunder all powers of local self-government."

Counsel for the state say this means *all powers not in conflict with general laws*. Counsel for the city say it means *local police, sanitary and other regulations not in conflict with general laws*.

If all powers of municipal self-government must be subject to general laws, then clearly cities do not have home rule; they have only such powers of local self-government as the legislature of the state allows to them, and cities of Ohio will still remain under the domination of the state legislature. Who does not know that this domination is the very thing that the people of Ohio intended to abolish? Then, to the mind of plain men, the conviction follows that the restriction upon home rule by "general laws" is limited to "police, sanitary and other similar regulations." This

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conclusion is in harmony with a common-sense rule of construction, that a limitation or proviso in a grant shall not be interpreted so as to defeat or destroy the grant; it will be deemed to except from the grant only a part of the thing granted. If the thing granted be a power, then the reservation, proviso or restriction shall be interpreted as excepting from its operation some particular mode of exercising the power or as excluding some particular thing which would otherwise be within the power.

In this case, say counsel for the state, the thing excepted is nomination and election of municipal officers. Counsel for the city say that subject does not come within the category of "local police, sanitary and other similar regulations," and hence not within the exception. If from the grant of "all powers of self-government" the right of nonpartisan nominations, and whatever else the legislature may wish to deny, is excluded, then, as the supreme court of Minnesota say, "if this is the extent of the power conferred upon cities to make their own charters, the constitutional grant is a mere form of words of no practical value." *Grant v. Berrisford*, 94 Minn., 45, 48. In a later case the same court say: "The power to frame such charter * * * necessarily includes all subjects appropriate to the orderly conduct of municipal affairs." *Schigley v. City of Waseca*, 106 Minn., 94, 100.

Confronted with this argument, counsel for the state filed a supplemental brief, taking refuge in Section 7 of Article V. Let us note, they leave the constitutional sub-title "Municipal Corporations"

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(Article XVIII) and go to a different subject, "Elective Franchise" (Article V). They plant themselves upon the first clause of Section 7 of the latter article: "All nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition *as provided by law.*"

They say that Section 7 of Article V modifies Section 7 of Article XVIII. They argue that this clause requires all charter cities to have the direct primary election which is prescribed by state law. Counsel for the city retort that the phrase "*as provided by law*" refers to the proper law in vogue in the local jurisdiction; if the nomination be for charter city offices the municipal law (the charter) governs, but if the nomination be for county or state offices, then the law of the state governs, of course. That is to say, there may be two modes of nomination in the city, one provided by charter for offices created by charter, another provided by statute for offices controlled by the state. For this very reason, they say, the generic word "*law*" is used in this section, and not the specific term "*general law*," as in Sections 3, 8, and 14 of Article XVIII, where it means statute law.

Now, here is a specific difference, and a logical reason assigned for it. If this be an adequate account of the cause of the difference, and no other sufficient cause be given, then it goes a long way towards refuting the state's argument and forcibly tends to support the contention of the city. It is at least sufficient to give the city the benefit of the doubt; it puts upon the state the burden of

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establishing a better reason. If the constitution makers intended to use the word "law" in Article V as synonymous with statutory law, counsel for the state have not told us any reason why the definitive word "general" or "statutory" was not employed with it, as in Article XVIII.

It is true that in the original constitution, before the revision, the word "law" is employed in the specific sense of statutory law, but it is equally manifest that the revisers have discriminated between the generic and specific import of the word. It is also important to note that both instances of the use of the word in the passages here in question, occur *in the amendments*, not in the original document, so that we have the revisers' use of the word to deal with. If they meant the word "law" to signify the *general* law, and to exclude the *local* law, it is a fair inference that they would have used the definite term "general law" in Article V as they did in Article XVIII.

Again: By the method of the logical analysis of the connotation of terms, the argument on behalf of the state runs upon another horn of the dilemma. The nominations required to be made "as provided by *law*" are "for elective state, district, county and *municipal* offices." If the word "law" is to be taken in its narrow sense of state law, why shall not "municipal" be taken in its narrow sense of state-governed municipal corporation? But it must be conceded that the revisers of our constitution have embodied in the revision a new signification of the word "municipal;" they have engrafted a new logical attribute upon the concept. In the old constitution the only notion symbolized

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by the word was a local subdivision of the state endowed with limited political autonomy within certain definite branches of governmental functions—in short, a legal creature of restricted powers: (Title XII, General Code.) The revision adds a new idea to the notion; the amendments have *doubled* the concept. The word now means a territorial organization of people under a charter with *unlimited* powers of self-government, and also, as formerly, such a body of people organized with restricted powers under general law. Now, if we must give “law” its old restricted force of general or statutory law in Section 7, Article V, then why not read “municipal” in its old restricted sense of urban community governed by general law? Counsel for the state have given us no reason why, and we have found none. So by their own logical interpretation, self-governed charter cities are excluded from the purview of Section 7, Article V.

However, we do not rest upon formal logical interpretation of a mere word. We have in mind the sage wisdom of Chief Justice Marshall: “In performing the delicate and important duty of construing clauses of the constitution of our country, * * * it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of *the general objects to be accomplished* * * * *by the grant of power.*” (*Brown v. Maryland*, 12 Wheat., 419, 437.) Also Judge Cooley: “A reasonable construction is what such an instrument demands and should receive; and the real question is, *what the people meant*, and not how meaningless .

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their words can be made by the application of arbitrary rules." (Const. Lim., 7 ed., 95). And Blackstone: "The most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or *the cause which moved the legislator to enact it.*" (1 Comm., 61.) And Ihering, the German jurist: "Methods which attempt forcibly to transmute jurisprudence into legal mathematics, are wholly wrong and founded in a misunderstanding of the nature of law. Law is what life, business, and a sense of right decree to be * * *. The ideas of law must be sought in practical grounds. Logical intuition has not given being to a single one of them. Even legal dialectics, where it had to work out the consequence of principles and ideas, was really guided by the practical fitness of the results." (4 Geist des Roemischen Rechts, 3 ed., pp. 311, 315.)

Candor, quickened by an amiable communion with our brethren on the bench who disagree with us, bids us confess that one circumstance troubles us. The first section of Article V ordains that "Every white male citizen * * * who shall have been a resident * * * such time *as may be provided by law*, shall have the qualifications of an elector." Clearly the italicized words refer to the statutory law of the state. That the learned men and sagacious lawyers who collaborated upon these amendments would use the same phrase, "as provided by law," in a different sense when they penned Section 7, is very doubtful. That they made such an ambiguous use of the phrase consciously, is incredible. The most natural expla-

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nation of this equivocal use of the word "law" is that they did not observe that it has a more narrow signification in Section 1 than they intended by its use in Section 7 (if they so intended).

We must bear in mind that the men who wrote Section 7 one year ago had a different purpose in mind than the men had who wrote Section 1 sixty years ago, and that the people of Ohio who adopted Section 7 did not compare its phraseology with similar forms of expression in the old constitution, but contemplated Section 7 only as a separate amendment abolishing the old style of nominations, unrelated to Section 1 of the original document, which prescribes the qualifications of electors. Shall we cause their purpose to fail in regard to a still more remote subject, viz., direct popular government of municipalities, because imperfections of literary style and incongruities of expression appear in the document when the new parts are placed here and there amongst the old? Shall we practically nullify the biggest and most elaborate amendment, which the people have ordained by a vast majority, for the sake of what may be called unity of design and precision of legal ideas?

We recall a canon of interpretation as laid down by Chief Justice Marshall: "The same words have not necessarily the same meaning attached to them when found in different parts of the same instrument; their meaning is controlled by the context." (*Cherokee Nation v. Georgia*, 5 Pet., 1, 19.) Again: "The intention of the instrument must prevail; this intention must be collected from its words; its words are to be understood in that

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sense in which they are generally used by those for whom they are intended; its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers * * * ." (*Ogden v. Saunders*, 12 Wheat., 332).

Counsel for the state must go a step further. They must persuade us that Section 7, Article V, requires that nominations shall be by *both* methods, by primary election *and* by petition. They paraphrase the section thus: All nominations * * * shall be made as provided by law (statute law) at direct primary elections, or by petition, *as the electors may choose*. They contend that the lawmaking body cannot adopt either mode to the exclusion of the other; and so they argue that if the local law, the charter, prevails over municipal nominations, the charter must give voters the alternative of nominating by primary election *or* by petition, because this section of Article V is intended to guarantee to citizens of the state both modes of selecting candidates. This process of reasoning raises a doubt; it certainly does not resolve the doubt.

But the process is not a legitimate one. The primary rule of interpretation is that the language is to have its ordinary and usual signification, if it be not absurd. The simple common-sense meaning of the clause, "All nominations * * * shall be made at direct primary elections *or* by petition as provided by law," is that nominations shall be restricted to these two modes, and the law may provide for one or the other. The phraseology of the section standing alone is not

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ambiguous. Hence it does not require construction with anything else. (*Slingluff v. Weaver*, 66 Ohio St., 621.)

Counsel are not content to paraphrase the clause thus: "at direct primary election or by petition, or both." That would still allow the city to adopt either method; so counsel go the great length of reading "and" for "or." We think this is a strained construction. We do not say it is unnatural, because it is suggested by a plausible reason. The thought is that the revisers of the constitution were aware of the tyranny of party machinery, and they provided that if the minority are not given fair treatment at the party primary, resort may be had to petitions to bring forward minority candidates. We cannot deny that some thought of this kind may have been in the minds of some members of the constitutional convention and of some electors who voted for this amendment. But we do not feel such a conviction that this was the motive of it as to warrant us to depart from the direct, positive and customary signification of the language. We think every good purpose will be subserved by our interpretation according to the primary and natural import of the language. This gives to the state, and to the cities as well, party nominations at primary elections if the people want their ballots made that way. But, upon the people of a free-charter city, to whom the constitution in ample and positive terms has guaranteed the form and method of government they have chosen for themselves, we will not enforce party nominations against their will.

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Now, the doubt which springs out of a contemplation of the two sections side by side, is a mere accident which never occurred to the minds of the men who drafted, nor of the men who adopted, these amendments. What they had in mind when providing for "*Primary Elections*" (which was the proposal title of Section 7, Article V) was to dispense with nominations by conventions, party bosses and "slates." The purpose of Section 7, Article XVIII (title "*Home Rule*") was just as clearly to refer *all power* of municipal government directly to the people of the cities themselves, free from the domination and manipulation of the state legislature and lobby. This power includes the control of the method of selecting the agents of the municipal government, for if the legislature may prescribe to cities the choice of their municipal officers by the partisan primary method, the recent history of at least one city in Ohio shows that the boss of the dominant party in the city may not only control the city but the legislature also.

Shall we resolve a latent ambiguity as to the extent of the powers of free-charter municipal government, by bringing to our aid from Article V an obscure phrase more difficult to interpret than the disputed passage from Article XVIII? If we may use this method of construction by reference to the remote context, what do we gain? We make the home-rule amendment, upon which depends the natural evolution of our cities, the reform of municipal government and the prosperity of the state, a rope of sand! *Cui bono?*

Let us examine the reason why we are urged to do this thing. The argument runs thus: Ours is

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a representative government. If we would preserve it we must jealously safeguard the freedom of the elective franchise. This is a function of popular government, essential to the purity of republican institutions and to the existence of the state. Therefore the state dares not, and the constitution does not intend to, delegate to municipalities any share of the sovereign power over elections.

We grant the premise; it is true; but the conclusion does not follow. The reasoning rests upon a suppressed minor premise which is false. It is this: There cannot be an *imperium in imperio* respecting so vital an organ of government as the system of elective franchise, even to the extent of allowing the people of municipal corporations to devise and adopt their own method of selecting their representatives to administer their urban government. If this be true, we marvel that the Fathers of the Republic who framed the federal plan of our national government did not see the danger.

We may marvel still more that the mechanism which they contrived of co-ordinated local sovereignties within a paramount sovereignty—the local and general blending their schemes of elections and each controlling its own—has run on safely for a century and a quarter.

The federal government secures to each elector in every state the free and fair exercise of his right of franchise as to federal elections, with federal arms if necessary; but as to elections for state officers the state is left to choose its own methods and to enforce them by its own police patrol and

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otherwise. If the people of Ohio have decreed a similar arrangement between their state government and the local municipal governments, we have no authority to thwart their will, if we had ever so grave a doubt of the wisdom of the plan. It is our duty to enforce it according to the purpose and spirit of it.

The conclusion to which we have come, is, we think, founded upon the stronger reasons; it is in harmony with the popular will which we confidently believe was intended to be expressed in the amendment. And it has the support of the great majority of the highest courts of other states which have adopted similar constitutional provisions, whose decisions are cited in the briefs of counsel. Judgment of the lower court should be affirmed.

DONAHUE, J., dissenting. It is certainly clear from the reading of Sections 3 and 7 of Article XVIII that the constitutional convention, when it framed these amendments to the constitution, and that the people of this state, when they adopted them, intended to give, and did give, to municipalities full authority to exercise all powers of local self-government, but it is also clear that municipalities are subject equally with the state to any and all other provisions of the constitution affecting the exercise of governmental powers.

The beneficence of municipal home rule is not a question involved in this controversy. The arguments in favor of or against it were proper considerations for the constitutional convention

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and for the electors of the state, but now that constitution is the paramount law of this state. The sole and only duty of the court is to interpret it as it is written, and not as the court thinks it should have been written. Any attempt to force a construction of this constitution in line with the personal preference of the court would be a flagrant abuse of the court's authority.

It is not here contended, nor does any one who is fully advised upon the subject contend, that the constitutional amendments do not impose some limitations upon municipalities in the exercise of local self-government. These limitations are written into the constitution and are just as important as any other part of the constitution. Section 3 of Article XVIII, which grants to municipalities the right to govern themselves, also provides that local police, sanitary and other similar regulations shall not conflict with general laws. Section 13 of Article XVIII provides that "Laws may be passed to limit the power of municipalities to levy taxes and incur debts for local purposes, and may require reports from municipalities as to their financial condition and transactions, in such form as may be provided by law, and may provide for the examination of the vouchers, books and accounts of all municipal authorities, or of public undertakings conducted by such authorities." These limitations may be wise or unwise. However that may be, it is idle to say that they do not apply to cities having adopted charters under favor of Section 7 of Article XVIII of the Constitution.

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The conferring of home rule upon municipalities was not the only purpose of the constitutional convention. Many other matters of equal importance induced the call for a constitutional convention, and principal among these other matters was the desire on the part of the people of this state to abolish political conventions and to establish in their stead uniform methods for the nomination of elective state, district, county and municipal officers. Apparently the constitutional convention deemed this of equal importance to municipal home rule, and it appears that the electors of the state were more interested in the former, for that amendment received a very much larger majority of the popular vote than did the latter proposal providing for home rule. This purpose of the people and of the constitutional convention found expression in Section 7 of Article V, which provides, among other things, that "All nominations for elective state, district, county and *municipal* offices shall be made at direct primary elections or by petition as provided by law." The proper construction of this provision of the constitution is the vital question in this case and dispositive of it. The language of this amendment is so plain, positive and direct that it needs no construction. By its express terms it applies not only to the state, to districts and to counties, but also to every municipality in the state, and it is not the province of a court to read into this amendment the words "except in cities that have adopted a charter providing for other methods of nomination," no matter if the court is of the opinion that these words should have been written

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therein. Any refusal on the part of the court to enforce any provision of the constitution of a state, or to change or alter its plain and unambiguous terms, is a clear usurpation of authority. The constitution itself provides the means and method by which it may be amended and it is needless to say the method so provided is not by judicial construction.

Whether the word "or" as it is used in this section of the constitution should be read "and" has absolutely nothing to do with determining whether this provision of the constitution applies to cities having adopted charters. The statutes of our state expressly provide that "and" may be read "or" and "or" read "and," if the sense requires it, but a change in the reading would be no answer to the question propounded. If the authority to provide by law for nominations is vested in municipalities and not in the general assembly of the state, then even though "or" should be read "and," and this provision of the charter is unconstitutional for that reason only, it could be amended forthwith by the same authority that created it. On the contrary, this opinion is based upon the proposition that the municipal corporation has no such authority. There is no distinction made in Section 7 of Article V between elective state, district and county offices and municipal offices. All are alike comprehended in the positive and unequivocal language of this constitutional provision, and the nomination of candidates for each of these offices must be made at a direct primary election, or by petition, as provided by law.

Not only is the language of Section 7 of Article V clear and unambiguous, but it also appears from

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the debates in the constitutional convention just what that convention intended by this amendment. When an amendment was offered, inserting the words "or otherwise" between the word "petition" and the phrase "as provided by law," it was very promptly rejected, for the reasons then stated by members of that convention that such an amendment would entirely destroy not only the effect but the purpose of this proposal, and would permit the doing of the very thing that the proposal was intended to prevent. No matter what may be said as to the purpose or advantage of municipal home rule, with all of which I have no quarrel whatever, yet the fact remains that one part of the constitution of the state should receive no more favorable consideration from a court than each and all its other parts. The constitution, while it is divided into articles and sections, is nevertheless a unit. It is the fundamental law of the state and expresses the will of the highest authority in the state, and to this authority all good men must yield whether in accord therewith or not. There is no conclusion that can be reached by any process of right reasoning other than that Section 7 of Article V of the Constitution applies to the state and every district and county and municipality in the state, and that each and all must conform to the provisions thereof until the authority that has made this constitution shall otherwise direct.

Nor do I understand that counsel differ upon this proposition. Their difference arises rather upon the proper construction of Section 7, Article V. It is contended upon the part of counsel for

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the relator that the word "law," as used in the phrase in that section "as provided by law," does not mean an act of the general assembly of Ohio only, but that it also includes the provisions of any charter adopted by a municipality under favor of Section 7, Article XVIII of the Constitution. It is true, that the word "law" is very comprehensive in its meaning. It would be hard to frame a definition of the word that would not be too narrow in its limitations if it is to be taken in its broadest and most comprehensive sense. In this state, however, we ought not to meet with much difficulty in determining the sense in which this word is here used. The connection in which it is found materially assists in determining its meaning; it occurs a great number of times in these amendments to the constitution, and in every other connection in which it is used it is so perfectly plain that it means an act of the general assembly of Ohio as to be beyond controversy.

In the same line of Section 7, Article V, it is used in the sentence "provision shall be made by *law* for a preferential vote for United States senator." It must be conceded that in this sentence it means an act of the general assembly of the state. It is unbelievable that this word was intended to mean one thing in one sentence of a section of the constitution of the state, and another thing in another sentence of the same section. To hold this to be true would be to hold, in effect, that the framers of these amendments juggled with words for the purpose of perpetrating a fraud upon the electorate of the state and that this purpose has been fully accomplished. Such a conclusion would

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be ridiculous. The framers of the constitution and the electors who have adopted it undoubtedly intended not only that each word used therein should be given its usual and ordinary meaning, but also that the language used should have uniform meaning throughout the entire constitution. The example I have given of the use of this word in immediate connection with the phrase under discussion is not the only instance in these amendments that clearly indicates the meaning to be given to this word and the sense in which it was used by the framers of these proposals.

Section 1 of this same article, defining the qualifications of an elector, provides, among other things, that he shall have resided in the county, township or ward "such time as may be *provided by law*." In Sections 1, 2, 10, 12, 13 and 14 of Article XVIII, which is the municipal home-rule amendment, the word "law" and the phrase "prescribed by law" are used many times, and yet in no single instance where they are so used is there any possible doubt as to the meaning intended thereby. In Section 1, providing for the classification of municipal corporations into cities and villages, the following language is used: "The method of transition from one class to the other shall be *regulated by law*." In the last line of Section 2 is the following: "under regulations to be *established by law*." In Section 10, which provides for appropriating or otherwise acquiring property for public use and for the issuing of bonds therefor, we find the further provision that such bonds shall not "be

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included in any limitation of the bonded indebtedness of such municipality *prescribed by law*." In Section 12 of the same article is found a provision for the issuing of bonds for certain purposes "beyond the general limit of bonded indebtedness *prescribed by law*." In Section 13 it is provided that *laws* may be passed to limit the powers of municipalities to levy taxes and incur debts for local purposes. Section 9 of Article I, as proposed by the constitutional convention, but not adopted by the electors, contained the phrase "until otherwise *provided by law*." Section 16 of Article I, "and in such manner as may be *provided by law*." Section 19a, "shall not be *limited by law*." In Section 1f of Article II are found the phrases "*authorized by law*" and "*provided by law*." Section 1g of the same article contains the phrase "unless otherwise *provided by law*." Sections 33, 34, 35, 36, 38, 39, 40 and 41 of Article II contain similar expressions. In Section 2 of Article IV is found the phrase "*otherwise provided by law*." In fact, nearly every proposal submitted by the constitutional convention of 1912 contains a similar use of the word "law" and the phrase "as provided by law," and yet in no other single instance would it be claimed by any one that the word "law" was intended to mean or does mean anything other than an act of the general assembly of Ohio. It would, therefore, seem incredible that in this one section, and in this one sentence of this section, the word "law" should have any other or different meaning than it has in all other parts of the constitution. Not only this, but many of the statutes of our state contain the word "law" and

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"as prescribed by law," and yet in every instance the meaning is so clear it would be idle to contend for any other or different meaning than that the word or phrase when so used means statutory law.

It is undoubtedly true that the constitution of the state, the common law, municipal charters and municipal ordinances, come within the general definition of the word "law," but in all the history of this state the specific nomenclature of laws of different nature or origin has been so persistently adhered to, that there is no longer possibility of mistake in the meaning of the word. Whenever the reference is to constitutional law, ordinances or charter, the specific words are used, but whenever it is intended to refer to statutory law the word "statutory" is seldom or never used, but only the word "law," unmodified by any descriptive term. Long before this amendment was written this court declared this to be the proper meaning of the word "law" when so used without other descriptive term. When the framers of the constitution made use of this word, it must be presumed that they intended it should have the meaning and intent that had theretofore been given it by judicial construction. This court held in the case of *Johnson v. State*, 66 Ohio St., 59, and *State v. Collingsworth*, 82 Ohio St., 154, that an act in violation of the common law or an act in violation of a municipal ordinance is not an unlawful act within the meaning of the provisions of Section 12404, General Code, which provides that "Whoever unlawfully kills another, except in the manner described in the next four preceding sections, is guilty of manslaughter."

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It follows then that the word "law" as found in the phrase "as provided by law" in Section 7 of Article V of the Constitution must be given its plain, ordinary and usual meaning and that that meaning must be uniform in all the parts of the constitution and the amendments thereto, and as it clearly appears that wherever this word is used in other parts of the constitution, or the amendments thereto, it means an act of the general assembly of this state, so in this section it must be given the same meaning.

This construction of this provision of the constitution is in no wise in derogation of the authority of municipalities to exercise all powers of local self-government. It must be conceded that the state has been given as full authority to control its own affairs as has been given to municipalities, and yet the state is equally subject to the provisions of this amendment. True, the legislature is given the authority to provide the means and methods by which this provision of Section 7 of Article V shall be carried into effect, but the constitution itself provides the substance, binding alike upon the state and municipalities, and it is but the mere detail that is left to legislative authority. The legislature has no discretion to change these provisions in any particular, nor can it hinder or delay their operation. If these provisions must obtain in state and city alike, it is not of very great importance which authority shall provide for the detail of carrying them into effect. Certainly there should be one uniform plan, available to the electors residing within municipalities as well as to the electors of the state residing outside munici-

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palities. Undoubtedly this was the reason that the people of the state, in the adoption of its constitution, committed to the legislature of the state the right to adopt and prescribe that uniform plan. Beyond that, the legislature has no power, and the provisions of the constitution are supreme.

The first general assembly of this state convening after the adoption of this amendment has so interpreted this language, and, in accordance with such interpretation, has passed an act providing for the nomination of candidates for all elective state, district, county and municipal offices, in accordance with the provisions of this section of the constitution (103 O. L., 476). This act was approved by the governor of the state. It is true that this law does not take effect until January 1, 1914; but it does show the construction placed upon this amendment to the constitution by the legislative and executive departments of state. At the time this amendment was adopted, there was similar legislation covering the same subject-matter (Sections 4948 to 5015, General Code, inclusive), and by the provision of the constitution itself, these laws, not being in conflict with the constitutional amendments, remain in full force and effect.

In this connection there is another significant fact that must not be overlooked, and that is that in framing this amendment the existence of these laws are recognized by the phrase "as provided by law," while in the next sentence the language is that "provision shall be made by law for a preferential vote for United States senator." In one case the language used is directly applicable

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to existing statutory law, and, of course, to any future amendment thereof. In the second case, it has reference only to laws that are to be passed in the future by the general assembly of the state.

It would appear, therefore, that the phrase "as provided by law" means as provided by an act of the general assembly of Ohio, and not as provided by the charter or ordinances of a municipality.

The provisions of Section 7 of Article V apply only to primary elections, and the record in this case presents no question touching the manner or the method of the election of officers after they are placed in nomination by the one or the other of the methods prescribed by that amendment, and, therefore, that question requires no consideration or discussion at this time.

For the reasons above given I dissent from the judgment of affirmance entered by this court in this case.

SHAUCK and NEWMAN, JJ., concur in the dissenting opinion.

Syllabus.

HON. HUGH L. NICHOLS, CHIEF JUSTICE.*

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|--------------------------|---|---------|
| HON. JOHN A. SHAUCK, | } | JUDGES. |
| HON. JAMES G. JOHNSON, | | |
| HON. MAURICE H. DONAHUE, | | |
| HON. R. M. WANAMAKER, | | |
| HON. OSCAR W. NEWMAN, | | |
| HON. J. FOSTER WILKIN, | | |

RABE ET AL. v. THE BOARD OF EDUCATION OF THE
CANTON SCHOOL DISTRICT ET AL.

Taxation—Limitation on tax rate—Sections 5649-2 to 5649-5b, General Code—Statutes in conflict repealed by implication—Basis of calculation established, how—Limitation of issuance of bonds—Amount of income from taxes to be levied—In anticipation of bond issue—To be determined, how.

1. Sections 5649-2 to 5649-5b, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication.
2. These sections of the General Code furnish the basis of calculation for the issue of bonds in anticipation of income from taxes levied or to be levied.
3. Bonds cannot be issued in anticipation of income from taxes levied or to be levied in an amount greater than the income to be anticipated thereby.
4. In determining the amount of income from taxes levied or to be levied that may be anticipated by an issue of bonds by any taxing authority, the calculation must be based on the same proportion of the total maximum levy in any one taxing district as the proportion of the maximum levy it is authorized to certify to

* Appointed by Governor James M. Cox and sworn in September 22, 1913, to serve until January 1, 1915. The amendment to Section 2, Article IV, Constitution, adopted September 3, 1912, increased the number of judges to seven by creating the office of chief justice. Section 1467, General Code, authorizes the governor to appoint the chief justice until such officer is elected and qualified.
—REPORTER.

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the budget commissioners is to the total maximum levies that all the taxing authorities within that taxing district are authorized to certify.

(No. 14065—Decided September 30, 1913.)

ERROR to the Circuit Court of Stark county.

The board of education of the Canton city school district passed a resolution on the first day of April, 1912, entitled "a resolution to provide for the issuance of bonds of the Canton city school district in the city of Canton, Ohio, for the purpose of obtaining and improving school property within that school district."

This resolution declared, among other things, that these bonds were to be issued under authority of Section 7629, General Code.

On the 22nd day of the same month the board of education elected to take certain properties for a high school site which it then held under option contracts at the aggregate price of \$59,800. This, however, was not sufficient property for the purpose, and it became necessary to appropriate other property, which would bring the total cost up to about \$100,000.

On the 30th day of April, 1912, Thomas H. Rabe, Emma Bucher, Caroline P. Bockius, Austin C. Brant, Clara B. Shanafelt, H. M. Geiger and Minna M. Portmann, taxpayers of the city school district of the city of Canton, filed a petition in the common pleas court of Stark county, on behalf of themselves and other taxpayers within that taxing district and on behalf of the Canton city school district, making the board of education and

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certain individual members and officers thereof parties defendant thereto, asking that the board of education be enjoined from entering into any contract for the purchase of this property or paying any money out of funds belonging to the school district for and on account of the purchase, and praying further that the board of education be enjoined from issuing bonds in the sum of \$110,000 or any other sum or amount whatever in pursuance of the resolution declaring the necessity of issuing and the purpose of the board of education to issue the same.

On the trial in the common pleas court the temporary injunction theretofore allowed by that court was dissolved, and the petition of the plaintiffs dismissed. The cause was then appealed to the circuit court of Stark county, which court made and entered the following judgment: "It is therefore adjudged and decreed that the defendants be and they are hereby perpetually enjoined from purchasing said several tracts of real estate described in plaintiff's petition, under said option contracts heretofore entered into with the owners of said property, because said money was not in fund and certified to be in fund and unappropriated for any other use, sufficient to pay the consideration for said properties; and it is further adjudged and decreed that the second cause of action in plaintiff's petition be dismissed and that the temporary injunction heretofore granted herein restraining the defendants from selling said bonds in said second cause of action in plaintiffs' petition described, be dissolved, set aside and held for naught, and the costs herein are adjudged against the defendants."

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Error is prosecuted in this court by the plaintiffs in the original suit to reverse the judgment of the circuit court dismissing the second cause of action in the petition contained.

No cross-petition has been filed by defendants in error seeking a reversal of the judgment of the circuit court enjoining the purchasing of the property.

Messrs. McCarty & McClintock and Messrs. Welty & Albaugh, for plaintiffs in error.

Mr. John T. Blakc; Mr. David E. Daniels; Mr. Ralph S. Ambler; Mr. Timothy S. Hogan, attorney general, and Mr. Clarence D. Laylin, for defendants in error.

DONAHUE, J. Our attention is directed to the fact that since the rendition of the judgment of the circuit court, which is sought to be reversed by this proceeding in error, certain important changes have been made in the constitution and statutory laws of our state, and that these changes directly affect the questions here presented. It would seem unnecessary to say that this court cannot consider these amendments, except, perhaps, in so far as they might aid in the construction of the law as it existed at the time of the adoption of this resolution providing for an issue of bonds.

The authority of this board of education to issue these bonds must be determined solely with reference to the law as it then existed and without reference to what the law had been in the past or

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might be in the future. The board of education was neither required nor permitted to anticipate any change in the law.

The resolution adopted by the board of education of the Canton city school district, providing for the issue of bonds in the sum of \$110,000, purports to issue the same under the authority conferred upon it by Section 7629, General Code. This section provides that the board of education may issue bonds in anticipation of income from taxes, levied or to be levied, from time to time, as occasion requires, in an amount not greater than would equal an aggregate of a tax at the rate of two mills for the year next preceding such issue. Section 7630, General Code, further limits the issue of bonds to an amount that can be provided for and paid with the tax levies authorized by Sections 7591 and 7592, General Code. Section 7591 authorizes a levy for all school purposes not to exceed twelve mills on the dollar of the tax valuation. Section 7592 authorizes an additional levy of five mills for any number of consecutive years not exceeding five, in addition to this twelve-mill levy, when such additional levy is approved by a majority of the votes of the electors of the school district.

These sections were the law of Ohio when the general assembly passed Sections 5649-2 to 5649-6, General Code. These sections limit the rate of taxes that may be levied within any taxing district for all purposes to ten mills on the dollar of the tax valuation of the taxable property of any county, township, city, village, school district or other taxing district for that year, and such levies in addition thereto for sinking fund and

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interest purposes as may be necessary to provide for any indebtedness heretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people. These sections, as they read at the time of the adoption of this resolution to issue bonds, also contain the further limitation that the total amount of taxes levied in the year 1911 or any year thereafter, for all purposes, shall not exceed in the aggregate, the total amount of taxes levied in the year 1910, plus six per cent. thereof for the year 1912, nine per cent. for the year 1913 and twelve per cent. thereof for any years thereafter, or, such less amount as may be produced by the levy of a maximum rate of ten mills on each dollar of the tax valuation of the taxable property in any county, township, city, village, school district or taxing district, for that year, whether such taxes be levied for the same or other purposes, except levies made for interest and sinking fund purposes.

The legislature when it passed these sections of the General Code limiting the rate of taxes that might be levied in any one taxing district, did not specifically repeal Sections 7591 and 7592, General Code, but the effect of this later legislation upon these former statutes cannot be doubted. It is conceded in the brief of one of counsel for the board of education that this limitation is in direct conflict with the limitations provided in these former sections, and that they are, therefore, repealed by implication. No other conclusion is possible. Sections 5649-2 *et seq.*, at the time this resolution to issue bonds was adopted, in plain and unambiguous language peremptorily limited

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the rate of taxes that could be levied upon the tax valuation in any one taxing district for all state, county, city, village and school purposes combined, to ten mills on the dollar, excepting therefrom levies for sinking fund and interest purposes necessary to provide for any indebtedness theretofore incurred or any indebtedness that might thereafter be incurred by a vote of the people, and excepting also from this limitation levies for emergencies mentioned in Sections 4450, 4451, 5629 and 7419, General Code, and further provided that an increased rate might be levied in such an amount that the aggregate levy would not exceed fifteen mills on the dollar in any taxing district, exclusive of the exceptions hereinbefore set forth, provided the proposition to levy such increased rate was submitted to the electors of the taxing district and a majority vote cast in favor thereof.

It is the duty of a court to harmonize and reconcile laws where possible. It is also the settled law of this state that an act of the legislature that fails to repeal in terms existing statutes on the same subject-matter must be held to repeal the same by implication if the later law is in direct conflict therewith. *Goff et al. v. Gates et al.*, 87 Ohio St., 142.

The provisions of Sections 5649-2 *et seq.*, in reference to the rate that may be levied in any taxing district, are so clearly in conflict with the provisions of Sections 7591 and 7592, General Code, that these sections are necessarily repealed by implication. That being true, Section 7630, General Code, must fall with them, for that section

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provides only for the application of the limitation in these repealed sections to the issue of bonds under Section 7629, General Code. It is suggested in the brief of counsel for defendant in error that Section 7630, General Code, is not necessarily repealed, but that, on the contrary, the provisions of this later legislation, limiting the rate of taxes that may be levied in any taxing district, should be read into this section, instead of the specific sections named, to-wit, Sections 7591 and 7592, General Code. In answer to this it is only necessary to suggest that a law cannot be amended in this way. If Sections 7591 and 7592, General Code, are no longer the law of Ohio, it necessarily follows that Section 7630, General Code, furnishes no rule for determining the rate of taxes levied or to be levied which may be anticipated by an issue of bonds under the provisions of Section 7629, General Code.

Our attention is called to the fact that the general assembly of Ohio passed an act amending Sections 5649-3*a*, 5649-3*b*, 5649-3*c*, 5649-3*d*, 5649-3*e* and Sections 5649-5*a*, 5649-5*b*, General Code, relating to the maximum tax rate which may be levied in any one taxing district, on the same day it passed an act amending Sections 7620 and 7625, General Code; that the former act was approved June 2, 1911, and the latter act was approved June 7, 1911; that in the act amending Section 7625, Sections 7629 and 7630 are referred to, and that, therefore, if there is to be a repeal by implication, this act amending Sections 7620 and 7625, being the later act, Sections 5649-2 *et seq.*, General Code, are the sections that are repealed by implication.

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Section 5649-2 was passed May 10, 1910, and its provisions being in conflict with Sections 7591 and 7592, these statutes were necessarily repealed by implication.

Section 16 of Article II of the Constitution of Ohio provides that no law shall be revived or amended unless the act contains the entire act revived, or the section or sections amended, and the section or sections so amended shall be repealed. It therefore follows that if these statutes were repealed by implication by the passage of Sections 5649-2 *et seq.*, General Code, and of this there can be no doubt, then they could not be revived, reenacted or amended by any method in direct conflict with the positive prohibition of the constitution. Sections 7591 and 7592, General Code, were not even referred to in the act amending Section 7625, General Code; but it is claimed that as that act refers to Section 7630, General Code, and Section 7630 in turn refers to Sections 7591 and 7592, General Code, it clearly indicates that the legislature of Ohio did not consider these sections repealed. The fact remains, however, that these sections were repealed by implication regardless of whether the general assembly recognized that fact or not.

It is claimed on behalf of the plaintiffs in error that the board of education has no authority to issue bonds under the provisions of Section 7629, without first submitting the question of issuing such bonds to a vote of the electors.

The history of this legislation is of very great importance in the consideration of this question. The first school code of Ohio was passed by the

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legislature on May 1, 1873. Section 1 of this code divided school districts into city districts of the first class, city school districts of the second class, village districts, special districts and township districts, and this distinction was carefully observed in all the sections of the code. Section 61 of that code was the original of Section 7625, General Code, and specifically applied to the board of education of any school district, *except a city school district of the first class*. Section 56 of this code, a part of which is the original of Section 7629, General Code, provided that any board of education of *any city district of the first class* might issue bonds in anticipation of income from taxes levied or to be levied.

On the 25th day of April, 1904, the legislature of Ohio adopted a new code of laws for the government of the common schools of the state of Ohio. In this code, adopted in 1904, the distinction between the boards of education of the different school districts is eliminated. Section 3991, Revised Statutes, now Section 7625, General Code, reads: "When the board of education of any school district determines," etc., while the original act read: "Whenever the board of education of any school district, *except city districts of the first class*, shall determine," etc. Section 3994, Revised Statutes, now Section 7629, General Code, reads: "The board of education of *any* school district may issue bonds." The original act read: "Any board of education of *any city school district of the first class*."

It is insisted that these two sections as amended apply to every board of education of any school

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district in Ohio, and can now serve no separate or several purpose if a vote of the electors is necessary to authorize the issue of bonds under both sections; and that it clearly appears that the limitation in Section 7629, General Code, to the amount of bonds equal to the aggregate of a two-mill levy on the duplicate of the preceding year payable from taxes levied under the provisions of Sections 7591 and 7592, General Code, means that to this extent the board of education has authority to issue bonds without submitting the question to a vote, but when bonds are to be issued in excess of this amount, and to be paid by a levy additional to the levies authorized by Sections 7591 and 7592, General Code, then a vote is required.

In view of the change in the wording of these sections from their original form in the school code of 1873, making the provisions of each section applicable to all boards of education of any school district in Ohio, it would appear that this is the only possible purpose in retaining both Sections 7625 and 7629, General Code. Unless this distinction does obtain the retention of these separate sections, applicable as amended to any and all boards of education, could serve no separate purpose whatever. The contention that the provisions in Section 7629, General Code, stipulating that the bonds issued under that statute must be issued subject to the restriction specified in Sections 7626 and 7627, General Code, which require that the issue of such bonds shall be submitted to the electors, because by the provisions of Section 7626, General Code, it is provided that "If a majority

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of the electors, voting on a proposition to issue bonds, vote in favor thereof, the board thereby shall be authorized to issue bonds for the amount indicated by the vote," cannot be sustained in view of the provisions of Section 7628, General Code. This section authorizes a tax levy in addition to the maximum levy authorized by Sections 7591 and 7592, General Code, for the purpose of providing for the payment of principal and interest of the bonds issued under the authority of the next three preceding sections when the proposition to issue such bonds has been approved by a majority vote of the electors, while Section 7630, General Code, provides that the tax that may be levied for the payment of principal and interest of bonds issued under Section 7629, General Code, shall not exceed the levy authorized by Sections 7591 and 7592, General Code; so that if in both cases the question of the issue of bonds is to be submitted to the electors, there would be no reason whatever for the separate provisions of Sections 7628 and 7630, General Code.

Conceding then the authority of the board of education to issue bonds under the provisions of this section, without first submitting the question of their issue to a vote of the electors of the school district, how stands this case? This school code of 1873 and its successor of 1904 were designed to cover the whole subject-matter. The sections therein were related to each other and mutually interdependent one upon the other. The provisions of Section 7629, General Code, were modified, aided and restricted by the provisions of Sections 7626, 7627, 7630, 7591 and 7592, General

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Code. These material parts of this code being no longer in force or effect, the whole plan and scheme is weakened and possibly destroyed.

If Section 7629, General Code, has survived the wreck of the plan provided by the school code of 1904, for the issuing of bonds by the board of education, it is not only bereft of its fellow sections of that code in reference to the same subject-matter, but it is deprived of the aid of their correlative provisions with reference not only to the issuing but to the retirement of bonds.

Section 7629, General Code, provides for the issue of bonds only in anticipation of income from taxes levied for the purposes named in that section. It is apparent from this provision that under no circumstances can bonds be issued under authority of this section in excess of the income to be anticipated arising from the levy of a tax, for the purposes named, within the limitations of law. This section contains a further provision—that the bonds issued thereunder shall not exceed an amount equal to the aggregate of a tax at the rate of two mills on the tax valuation for the year next preceding such issue. Section 7689, General Code, provides that the school year shall begin on the first day of September of each year and close on the 31st day of August of the succeeding year. This period is recognized as the fiscal year. These bonds were proposed to be issued in the fiscal year 1912. The evidence is uncontradicted that the total tax valuation for the fiscal year 1911 was \$19,893,240. A levy of two mills upon the total tax duplicate would produce less than \$40,000.

This section (7629) provides that "The board of education of any school district may issue bonds

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to obtain or improve public school property, and in anticipation of income from taxes, for such purposes, levied or to be levied, from time to time, as occasion requires, may issue and sell bonds."

This, of course, means that the income that may be anticipated by the issue of bonds under the provisions of Section 7629, General Code, is the income arising from taxes, levied or to be levied, for the purposes named in the statute, and not to anticipate levies made for current expenses or any other purpose except the purposes specified.

Counsel for defendant in error not only concede this proposition, but also recognize the necessity of providing first a levy for a fund sufficient to meet the current expenses of the elementary schools in that district already established, before a levy should be made for the purpose of purchasing a site for another high school. In the calculations submitted to this court; the necessary levy to meet these current expenses is deducted from the amount of the total levy the board of education is authorized to make for all purposes, and after this is done then the controversy arises as to whether the board of education, under the limitation of Section 5649-2 *et seq.*, can levy a specific tax in a sum sufficient to pay the interest and provide a sinking fund for the retirement of bonds in the sum of \$110,000 for the purpose of obtaining a high school site.

Counsel for defendants in error base their calculation on the calendar year, but their calculation of current expenses is for the fiscal year; so that one or the other must be rejected. If the calendar year is to be taken, then there is no evidence in this

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record upon which to base a calculation of the current expenses for the maintenance of the schools. Mr. Lane, who was the clerk and treasurer of the board of education, testifies as follows (page 57 of the record):

"Q. Your fiscal year begins September 1 and ends August 31 of each year? A. Yes, sir.

"Q. The difference between your receipts and expenses is \$3,243.64? A. Yes, sir; about that."

Mr. Lane is in position to know the exact financial condition of this board of education at the end of the fiscal year, and there is nothing in this record that refutes this positive evidence upon this important question. It is clear that this balance would not be sufficient to provide a sinking fund for the payment of principal and interest on the amount of bonds proposed to be issued.

Even if this amount were sufficient, it appears that the evidence of Mr. Lane is predicated upon a levy of four and one-tenth mills, and there is no certainty that this board of education can levy that amount in the future. In this case there was no vote of the electors authorizing an increased levy, so that as the law then provided the total levy for all purposes in this taxing district, exclusive of a levy for sinking fund and interest purposes, to provide for any indebtedness theretofore incurred or any indebtedness that may hereafter be incurred by a vote of the people, could not exceed ten mills on the dollar of the tax valuation. The taxing authorities are authorized to certify to the budget commissioners levies aggregating fifteen mills on the dollar of the tax valuation, and in case that is done it is the positive duty of the

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budget commissioners to reduce that amount to ten mills on the dollar. The only reasonable basis on which to estimate the amount of income that may be anticipated by an issue of bonds is the proportion of the maximum levy the taxing authority proposing to issue the bonds may certify to the budget commissioners to the total maximum levies that may be certified by all the taxing authorities in that district. The total maximum rate that can be certified by a board of education to the budget commissioners is five mills, which is just one-third of the total maximum that can be certified to the budget commissioners by all the taxing authorities in any taxing district. This court has held in the case of *The State, ex rel. City of Toledo, v. Sanzenbacher*, 84 Ohio St., 506-507, that the budget commissioners are not required to reduce the levies certified to them in proportion to the amount that each taxing authority is authorized to levy, but that in making such reduction they should give due regard to this proportion. Therefore, a rate determined in accordance with this proportion is not a fixed and certain rate that may be levied by the board of education in any and all events, yet it does furnish a reasonable basis and the only reasonable basis upon which a bond issue can be predicated.

If all the taxing authorities within any one taxing district were to issue bonds in anticipation of taxes to be levied at the maximum rate that they are authorized to certify to the budget commissioners, without reference to the fact that it is the duty of the budget commissioners to reduce the total amount of the tax levy certified to them to ten mills on the dollar of the tax valuation, it

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would follow that bonds would be issued largely in excess of the income to be anticipated from taxes levied or to be levied, for it is not possible that all of these taxing authorities may levy the maximum rate they are authorized to certify to the budget commissioners. Some years, by reason of the forbearance of some taxing authorities to levy their total maximum rate, the other taxing authorities may levy more than their proportionate share thereof, and some years, because of the urgent necessity and the equities of the situation, the budget commissioners may not strictly observe this proportion in reducing the levies certified to them to a total of ten mills on the dollar, and may permit a levy in excess of this proportion. Other years, for the same reasons, it may reduce the levy of any one taxing authority below this proportion. The fact that it may levy more this year than its proportionate share will not justify the assumption that it may continue to levy such rate, or any rate in excess thereof, for the number of years such bonds may run. On the contrary, the most that reasonably can be anticipated is that the annual rate it may be permitted to levy, one year with another, during the time such bonds may run, will average its fair proportion of the total tax rate that may be levied in that taxing district. Any rate above that proportion depends upon too many conditions and uncertainties, while on the other hand it is highly improbable that the average levy for the years these bonds are to run will fall below this proportion. It is apparent from the evidence in this case that a levy of three and one-third mills will not meet the current expenses of this school

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district, much less provide for the payment of these bonds and interest at maturity. Upon this proposition there is no conflict of evidence.

It is said that in this calculation the future financial condition of the school district need not be taken into consideration, for the increase in the tax duplicate will certainly equal the increase in the expenditures for school purposes made necessary by the increase in population.

Section 7644, General Code, requires that each board of education shall establish a sufficient number of elementary schools to provide for the free education of the youth of school age within the district, and that these elementary schools must be continued at least thirty-two weeks in each school year.

Section 7663, General Code, provides that the board of education may establish one or more high schools, whenever it deems the establishment of such school or schools proper or necessary for the convenience of the pupils attending them, or for the conduct and welfare of the educational interests of the district.

These bonds are proposed to be issued for the purpose of purchasing a high-school site, but under the mandatory provisions of Section 7644, General Code, it is the duty of the board of education to provide for the establishment of a sufficient number of elementary schools and to continue such schools for at least eight months in the school year, and where a high school has already been established it is certainly the duty of the board of education to provide for the continuing of that school before establishing another one, so

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that in estimating the amount of bonds that should be issued for this purpose the future imperative needs of the schools of this district must be taken into account.

The enormous increase of the tax duplicate in the fiscal year 1912 over the fiscal year 1911 is not likely to occur again, at least not in the near future, and yet if it had not been for this phenomenal increase within that time, this board of education would not now have sufficient funds to meet its current expenses. There is now a large bonded indebtedness that must be paid within the next eighteen years, and to that amount must be added the enormous amount of interest that will accrue on these bonds. The record (page 135) shows that it will require \$318,068.06 to retire the bonds coming due within the next nine years. The levy to provide for the retirement of these bonds now comes within the limitations of Section 5649-5b, as amended February 27, 1913. Counsel for the board of education in the opening pages of their brief inform us that for many years a new high-school building has been considered necessary in this district, and of late years the need became so pressing, due to the crowded condition of the schools, that the board of education decided to acquire a site for a large modern high-school building. This statement shows the increasing demands upon the funds of this school district. The very purpose for which these bonds are to be issued necessarily requires a large increase in the current expenses. It is hardly reasonable to suppose that the tax duplicate will increase with such rapidity as to permit the purchase of this site,

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the erection of such a building as may be required and the maintenance thereof. It would seem to be not only proper but necessary to take into account the future demands upon the school funds for school purposes in connection with the probable increase of the tax duplicate in determining just what income may be anticipated by the issue of bonds for the purchase of school property without detriment to the future imperative needs of the schools of that school district. This, of course, is a question for the determination of the board of education in the first instance, and a court of equity would not for this reason interfere to restrain the issue of these bonds, except for an abuse of discretion, and if the judgment of the board of education is acquiesced in by the taxpayers of that school district and the bonds have been issued in good faith, it would then be too late to challenge its decision in this particular.

At this time, under the amendment to the Constitution (Section 11, Article XII) which provides that no bonded indebtedness of the state or any political subdivision thereof shall be incurred or renewed, unless in the legislation under which such indebtedness is incurred or renewed provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds and provide for a sinking fund for their final redemption at maturity, it is of the utmost importance that at the time of the incurring of such indebtedness the other needs of the political subdivision proposing to issue the bonds should be taken into account, for this levy must continue during the term of the bonds in an amount suffi-

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cient to pay the interest and provide a sinking fund for their final redemption, even though the amount should exhaust the entire income available from taxation and without regard to the current expenses. In other words, under this provision of the constitution, the payment of interest and the retirement of bonds are to be provided for first, and the current expenses become a secondary consideration. This amendment, however, has no application to this case.

At best the situation presented by this record is an unfortunate one, but the law of this state, as it existed at the time this resolution was adopted, must be applied to the case at hand. The court recognizes the difficulties with which this board of education must contend in order to furnish the beneficence of education to the youth of that school district, but the court is no more the master of the situation than is the board of education itself. It can only interpret and apply the law given it by the legislature to the questions here presented. Some method of relief must be arrived at other than one not only in violation but in defiance of law. This is a matter that demands the early attention of the lawmaking power of this state.

That part of the judgment of the circuit court refusing an injunction, restraining the board of education from issuing these bonds, is reversed for the reasons above stated, and an injunction will be allowed as prayed for in the petition.

Judgment modified and judgment for plaintiffs in error.

NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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WEIR ET AL. v. THE SNIDER SAW MILL CO.

Sale of real estate—In partition proceeding—Is judicial sale, when—Rights of bona fide purchaser—Under Section 8543, General Code—Rule of caveat emptor—Purchaser of real estate entitled to timber standing thereon—Although timber sold previous to real estate purchase—When timber sale not filed in recorder's office and purchaser without notice.

1. A sale of real estate in a partition proceeding, under order of the court, is a judicial sale, and a *bona fide* purchaser at such sale is within the protection of the provisions of Section 8543, General Code.
2. The rule of *caveat emptor*, applicable to judicial sales, does not charge a purchaser at such sale with knowledge of the existence of an instrument conveying the real estate, or a part thereof, where the instrument has not been recorded or filed for record in the office of the recorder, and where the holder of the same has taken no step to put one on notice of its existence.
3. At a sale of real estate made in a partition proceeding, under order of the court, the purchaser acquires title to the standing timber thereon, although said timber had been sold by the person from whom the parties to the partition proceeding acquired title to the real estate by descent, and said sale of timber had been evidenced by a written instrument, but where said instrument had neither been recorded nor filed for record in the office of the recorder, and where the purchaser at the sale in the partition proceeding had no notice of the sale of said timber.

(No. 13351—Decided October 7, 1913.)

ERROR to the Circuit Court of Perry county.

Plaintiffs in error, who were plaintiffs in the common pleas court, brought an action against defendant for damages claimed to have been sustained by them by reason of defendant's unlawful and forcible entry upon their land and for the

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cutting down, carrying away and manufacturing into lumber and converting to its own use a large amount of timber. The land of plaintiffs is described in the petition, and defendant is charged with having committed the acts mentioned on or about the first day of September, 1909.

Defendant filed an answer in which it alleged that for many years prior to December 24, 1908, one Anthony Weible was the owner in fee simple of the real estate described in the petition, and continued to be such owner until his decease February 13, 1909; that on the 24th day of December, 1908, the said Anthony Weible sold to one Omer Snider, who was then and has been ever since a member of defendant company, all the timber on the real estate described in the petition, which lay north of a certain public road, for a valuable consideration paid by Snider, and the said Snider, as and for a receipt for said money and for a conveyance of said timber, received from said Weible a written paper and conveyance, which reads as follows:

"The Snider Saw Mill Company,
"Manufacturers and Dealers in Hardwood
Lumber.

"Special Bills Cut to Order.

"Somerset, Ohio, 12-24-08.

"Received of Omer Snider \$75.00 for all timber
north of road on my farm.

"ANTHONY WEIBLE;"

that the timber sold to Snider was purchased from him by defendant, and said written contract of

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purchase was by him immediately transferred and delivered to it and that it has ever since the payment of said money and the execution of said receipt and transfer been the owner of said timber, being the timber referred to in the petition which defendant is charged with cutting and removing; that the said Weible died intestate on the 13th day of February, 1909, and his real estate descended to his heirs; that he did not at his death own said timber, nor did it descend to his heirs, and that they acquired no title thereto or interest therein by reason of his death; that after the death of said Weible, one of his heirs, to whom said real estate descended, filed in the probate court of Perry county, Ohio, his petition for partition of said real estate, making all the heirs at law of said Weible defendants; that neither said Omer Snider nor the defendant was made party to the action; that thereafter such proceedings were had in said case that commissioners were appointed by the court to make partition of said real estate among the heirs of said Weible, and said commissioners, not being able to divide the same, returned an appraisement, and, thereupon, the court ordered a sale thereof by the sheriff, and the sheriff, after due advertisement, sold the same at partition sale on May 22, 1909, at public auction, and plaintiffs became the purchasers thereof at said sale, which sale was confirmed by the court, and that said purchase constituted plaintiffs' sole and only title to said real estate; that said Weible did not own said timber at the time of his decease, and that his heirs at law did not inherit it, and had no interest therein or claim thereto,

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and that plaintiffs, by their purchase at said partition sale, acquired only the title and ownership in said real estate which said heirs of Weible acquired by inheritance, and that plaintiffs have not and never had any right, title, interest or ownership in said timber.

Defendant, further answering the petition, denied each and every allegation therein contained, except such as was specially pleaded or expressly admitted to be true by its answer. Plaintiffs filed a motion in the trial court in which they asked to have stricken from the answer, as incompetent, irrelevant and immaterial, the allegations thereof relating to the ownership of the real estate in question by Weible, the sale of the timber to Snider, the assignment of the receipt to defendant, the death of Weible, the partition proceedings and the purchase of the real estate by plaintiffs; the matter asked to be stricken out being the whole of the answer, except the admission that the defendant was a corporation and a denial of such allegations of the petition as were not admitted to be true by the answer.

This motion was sustained by the common pleas court. Defendant then made application for a rehearing of said motion, which was denied, and the case was tried to a jury upon the issue joined by the petition and that part of the answer remaining after the matter above referred to was stricken out, and resulted in a verdict for plaintiffs. A motion for a new trial was filed and overruled, judgment rendered on the verdict and error prosecuted to the circuit court of Perry county by defendant, The Snider Saw Mill Company.

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The circuit court reversed the judgment of the common pleas court, upon the sole ground that the trial court erred in sustaining the motion of the plaintiffs below to strike from the answer the matters and things set out in the motion, and remanded the cause to the court of common pleas, with directions to overrule the motion of plaintiffs below and, thereupon, to proceed according to law.

Error is prosecuted to this court by plaintiffs in error to reverse the judgment of the circuit court and to affirm the judgment of the court of common pleas.

Messrs. Donahue & Spencer, for plaintiffs in error.

Mr. John Ferguson, for defendant in error.

NEWMAN, J. The question presented by the record for our determination is whether plaintiffs in error, the purchasers of the real estate of Weible at the sale in the partition proceeding, acquired title to the timber which had been sold by Weible to Snider and by him transferred to defendant in error. This question is raised by the motion to strike from the answer certain allegations relating to the sale of the timber and to the partition proceeding.

It cannot be claimed seriously that the sale of the timber in the case at bar was not a sale of an interest in land. The case of *Hirth v. Graham*, 50 Ohio St., 57, is in point, in which it is held that a sale of standing timber, whether or not

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the parties contemplate its immediate severance and removal by the vendee, is a contract concerning an interest in lands, within the meaning of the statute of frauds. This case is followed and approved in *Clark v. Guest*, 54 Ohio St., 298.

Section 8543, General Code, is as follows: "All other deeds and instruments of writing for the conveyance or incumbrance of lands, tenements, or hereditaments, executed agreeably to the provisions of this chapter, shall be recorded in the office of the recorder of the county in which the premises are situated, and until so recorded or filed for record, they shall be deemed fraudulent, so far as relates to a subsequent *bona fide* purchaser having, at the time of purchase, no knowledge of the existence of such former deed or instrument."

The instrument of writing by which Weible conveyed the timber in question was not recorded or filed for record in the office of the recorder of the county, nor is there any claim that plaintiffs had knowledge of the existence of the instrument, nor any claim that the purchaser or his transferee took possession or did any act or took any step which would put one on notice that they, or either of them, had any interest in or title to the timber at the time of the purchase of the real estate by the plaintiffs at the sale made in the partition proceeding.

In *Morris v. Daniels*, 35 Ohio St., 406, Judge McIlvaine, in passing upon a statute similar to Section 8543, in which the phrase "*bona fide* purchaser" was used, says a subsequent purchaser will not be protected against a prior unrecorded

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deed, unless the purchase be made in good faith, for a valuable consideration and without knowledge, at the time, of the existence of the former deed.

In the case at bar, the purchase by plaintiffs was made in good faith, for a valuable consideration and without knowledge, at the time, of the instrument executed by Weible.

It appears from that part of the answer which was stricken out on motion that the sale of the real estate in question was made by the sheriff under order of the court in a partition proceeding, which sale was confirmed by the court. It was a sale made by a court of competent jurisdiction in a pending proceeding by an officer authorized by law for that purpose, and confirmation was necessary. The sale in question was, therefore, a judicial sale, a distinguishing feature of which, as has been held by this court, is that it must be confirmed by the court before it will be complete.

But a *bona fide* purchaser at a judicial sale is entitled to the same protection, under the provisions of Section 8543, General Code, as a purchaser at private sale. This was the holding of this court in *Sternberger & Willard v. Ragland*, 57 Ohio St., 148, where it was held that a *bona fide* purchaser at a judicial sale, without notice of an unrecorded deed, is within the protection of Section 4134, Revised Statutes, now Section 8543, General Code.

We appreciate the fact that the rule of *caveat emptor* applies to judicial sales, but the rule does not charge a purchaser with knowledge of an unrecorded instrument affecting the title of the existence of which instrument he had no knowledge, nor where possession is not taken thereunder.

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In the case of *Arnold v. Donaldson*, 46 Ohio St., 73, which is cited by defendant in support of its contention, it is laid down as a rule that the maxim *caveat emptor* is applied in all its force in judicial sales, but it is stated by the court in that case that in the absence of fraud the buyer buys at his own risk as to title. In *Vattier v. Lytle's Executors*, 6 Ohio, 478, one of the earlier cases in which the rule of *caveat emptor* is discussed, the court follows and approves a case in which it is laid down that if there is fraud, that will affect the sale by sheriffs as well as all other sales.

By force of the provisions of Section 8543, an instrument for the conveyance of land, until it is recorded in the office of the recorder or filed for record, is deemed *fraudulent*, so far as it relates to a subsequent *bona fide* purchaser having, at the time of the purchase, no knowledge of the existence of such instrument. Can it be said, then, that in the case at bar there was an absence of fraud? The failure on the part of the defendant or its predecessor to record or file for record the instrument under which it was claiming title, so far as it affected the title of plaintiffs in error—the *bona fide* purchasers—under the plain provisions of Section 8543, rendered the instrument fraudulent.

It is contended by counsel for defendant in error that Weible, in his lifetime, after he had sold the timber to Snider, could not have asserted any right to the timber growing on the land north of the road running through the farm and described in the petition, that only such title as Weible himself had descended to his heirs, and only such title as the heirs had would pass by the sale in the partition

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suit. This seems to have been the ground upon which the circuit court based its decision in holding that the allegations set out in the answer constituted a good defense.

In support of their contention, counsel rely upon the case of *Tabler v. Wiseman*, 2 Ohio St., 208. In that case the whole of a tract of land, of which the intestate died seized, had been assigned to his widow as her dower. The question for determination was whether his heirs, who were remaindermen, could maintain a proceeding in partition during the lifetime of the widow. The rights of an innocent purchaser were in no way involved. We fail to see the applicability of the law of that case to the facts in the case at bar.

It is true that the instrument executed by Weible was enforceable as between him and defendant. It was enforceable against the heirs of Weible also, although it was neither recorded nor filed for record, for the reason that these heirs could not avail themselves of the provisions of Section 8543, for they were not *bona fide* purchasers. But as to plaintiffs, they were purchasers at a judicial sale and *bona fide* purchasers, and were protected by the provisions of this section. Had Weible, after the execution of the written instrument and upon the failure of Snider to have it recorded or to file it for record, sold the land at private sale to a *bona fide* purchaser, without knowledge of the existence of the instrument, the same would have been wholly unavailable against the purchaser. If the heirs of Weible had made a disposition of the property to a purchaser for value, and without knowledge of the existence of the instrument,

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defendant could have made no claim thereto. In either event, it could be claimed with as much force as is claimed in the case at bar that neither Weible nor his heirs could dispose of a greater interest in the land than they themselves actually owned. But such a doctrine is not sound, and, if carried into effect, would nullify wholly the provisions of Section 8543 and afford no protection to a *bona fide* purchaser of real estate having no knowledge of outstanding claims.

For the reasons we have given, we are of the opinion that the matter stricken from the answer of the defendant was immaterial and irrelevant and did not constitute a defense, and that the common pleas court committed no error in sustaining the motion. This being the only error found by the circuit court in reversing the judgment of the common pleas court, we conclude that the judgment of the circuit court should be reversed and that of the common pleas court affirmed.

Judgment of circuit court reversed and that of common pleas court affirmed.

SHAUCK, JOHNSON, WANAMAKER and WILKIN, JJ., concur. NICHOLS, C. J., and DONAHUE, J., not participating.

Statement of the Case.

THE FIRST NATIONAL BANK OF NEW BREMEN OH.
BURNS ET AL.

Negotiation of commercial paper—Policy of law to protect innocent holder—Corporation can act only through agent—Knowledge of agent is knowledge of corporation, when—Bank officer acting as individual and as manager of bank—In purchase of note from himself by the bank—Manager's knowledge as man also knowledge of bank—Law of agency.

1. It is the policy of the law in all negotiations of commercial paper, both in the interest of honest business and good morals, to protect the rights of all innocent holders for value and before maturity, and this equally whether such innocent holder be an individual or a corporation.
2. A corporation can act only through its officers and agents, and the knowledge of such officers and agents in the transaction of the corporation's business within the scope of their authority become at once the knowledge of the corporation without any actual or presumptive communication from agent to principal.
3. Where the officer is acting both for himself as an individual and as manager of a banking corporation in the purchase of a note from himself by the bank and his action in that behalf is adopted and ratified by the bank, the manager's knowledge as a man is equally his knowledge as manager of the bank. He cannot unknow as manager what he knows as man. To hold otherwise would be to promote fraud rather than prevent it.

(No. 13464—Decided October 7, 1913.)

ERROR to the Circuit Court of Darke county.

On or about the 15th day of September, 1910, The First National Bank of New Bremen, Ohio, brought suit against the Burnses on three several promissory notes which said Burnses had executed and delivered to one Julius Boesel, on July 10, 1908.

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Said banking corporation alleged that it had purchased from said Julius Boesel, the payee, certain notes for value and before maturity.

The answers of said defendants alleged want of consideration; that they were induced and procured to sign said promissory notes by the fraud of said Boesel, the payee; that said Boesel was at the times in question the president and one of the active managers of said bank, and that the bank had full notice and knowledge of such fraud and want of consideration at the time said notes were transferred and endorsed by said Boesel to said bank.

The bank by reply denied all the averments of said answers charging fraud and want of consideration, and claimed the rights of an innocent purchaser for value in due course and before maturity.

Upon these issues the case was brought to trial in the common pleas court before a jury, and the plaintiff, at the close of the evidence, moved the court to arrest the case from the jury and for judgment on the ground that there was no evidence tending to show that plaintiff was not an innocent holder of said promissory notes in due course, for value and before maturity.

It was, however, admitted at the time, and the bill of exceptions taken so certifies, that there was some evidence offered by the defendants tending to support all the averments of their answers as to fraud and want of consideration, and the only question raised by the motion was whether or not there was any evidence tending to show notice and knowledge of the bank as to fraud and want of

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consideration in procuring the Burnses to execute and deliver said notes to said Boesel. It was admitted at the time that the only knowledge that the bank had in this behalf was the knowledge of Boesel, so that the question then before the court upon that motion was in short this: Was the knowledge of Boesel acquired in connection with the making of the notes in question such knowledge as should be in law charged upon The First National Bank of New Bremen?

If this question is answered in the affirmative, the motion should have been overruled and the case submitted to the jury. If upon the other hand it is answered in the negative, the court as a matter of law should have sustained the motion and rendered judgment in favor of the bank.

The court of common pleas did sustain said motion and rendered judgment accordingly.

The circuit court reversed said judgment and remanded the case to the court of common pleas for further proceedings according to law.

These proceedings in error are now before this court to reverse the judgment of the circuit court and affirm the judgment of the court of common pleas.

Mr. Thomas J. Hughes and Mr. D. W. Bowman,
for plaintiff in error.

Mr. John C. Clark; Mr. Geo. W. Mannix, Jr.,
and *Mr. T. C. Miller,* for defendants in error.

WANAMAKER, J. It is agreed by the parties that the sole question in this case is: Was the knowledge of Boesel as an individual the knowl-

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edge of Boesel as president and manager of the bank?

Counsel for the bank put the question very clearly in their brief, to-wit: "The record discloses that it is conceded that the plaintiff was a national bank; that Julius Boesel, the payee of the notes, was its president and active manager; that he sold and discounted the notes to the bank, and that in so doing he acted for himself personally as indorsee and also for the bank as its president and manager; that no other officer or person connected with the bank had anything to do with the purchase of said notes and did not know thereof and had no notice or knowledge of any facts that would invalidate said notes in the hands of said Boesel; and further that the bank purchased said notes for value and before maturity, and was an innocent holder in due course, *unless the knowledge of Boesel was in law to be imputed to the bank.*"

"The record discloses that the bank did not concede the fraud or want of consideration alleged; only that the evidence offered by defendants tended to support the allegation of the answer on these issues," and therefore made such issues a matter for determination by the jury, unless the knowledge of Boesel could not be imputed to the bank when the bank purchased the notes of said Boesel.

Counsel on both sides have been more than usually diligent in searching the cases more or less analogous to the case at bar. The results of their inquiry together with the research of the court disclose a rather wide diversity of opinion. As to cases of this character it is unnecessary as it probably is impossible to attempt to reconcile all

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the numerous decisions. The question is largely a new one in Ohio.

A corporation can act only through its officers and agents, and the cases all agree on the elementary proposition that the acts of the agent within the scope of his agency are at once the acts of his principal, and obviously the knowledge of such agent in the doing of such act becomes the knowledge of his principal.

This general rule is admitted and adopted by practically all the courts, and if it shall apply in this case the acts and knowledge of Boesel, as president and active manager of the bank and hence its agent in purchasing said notes from Boesel the individual, become and are the acts and knowledge of the bank.

It is claimed, however, by plaintiff in error that this rule is no more generally recognized than certain well-known exceptions to the rule coming under a peculiar state of facts which plaintiff in error contends are identical with the state of facts in this case, to-wit, that notice or knowledge on the part of the agent will not be imputed to the principal where the agent's relations to the subject-matter, his previous conduct, or his adverse interests render it certain that he will not disclose such knowledge. In such cases the presumption is that the agent will conceal any fact which might be detrimental to his own interest. This doctrine is sustained in *Mechem on Agency*, Section 721 *et seq.*; *Koehler v. Dodge*, 31 Neb., 328; *Buffalo County Natl. Bank v. Sharpe*, 40 Neb., 123; *Benton v. German-American Natl. Bank*, 122 Mo., 332; *Merchants' Natl. Bank v. Lovitt*, 114 Mo., 519,

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21 S. W. Rep., 825; *Bank of Overton v. Thompson*, 118 Fed. Rep., 800, 56 C. C. A., 554; and numerous other cases cited in the notes.

The doctrine of this exception was very aptly and fully stated in one of the leading cases, *Innerarity v. Merchants' Natl. Bank*, 139 Mass., 332, as follows: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the facts in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating."

Mechem in his excellent work on agency lays down the rule in the following apt and accurate language: "It is a general rule, settled by an unbroken current of authority, that notice to an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal.

"In respect to this rule two important elements will be noticed. The first of these is that the notice or knowledge, which will affect the principal, is that only which is possessed by the agent while he is agent, and while he is acting within the scope of his authority. * * *

"The second element is that the notice or knowledge, which shall be imputed to the principal, is that only which relates to the subject-matter of that agent's authority, or, in other words, is that

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only which relates to the business or transaction in reference to which that agent is authorized to act by and for the principal.

"Two general theories prevail as to the foundation upon which this rule is based, and the results of these respective theories are not entirely alike. The first finds the reason of the rule in the *legal identity of the agent with the principal*, in the fact that the agent, while keeping within the scope of his authority, is, as to the matter embraced within it, for the time being the principal himself, or, at all events, the *alter ego* of the principal—the principal's other self. *Whatever notice or knowledge, then, reaches the agent under these circumstances, in law reaches the principal.* * * *

"The other theory is based upon the rule that it is the duty of the agent to disclose to his principal, all notice or knowledge which he may possess and which is necessary for the principal's protection or guidance. This duty the law presumes the agent to have performed, and, according to the view now being considered, imputes to the principal whatever notice or knowledge the agent then possessed, whether he has in fact disclosed it or not."

Mechem goes on to say: "The theory based upon the legal identity of the parties, and limiting the application of the rule to such notice or knowledge as was acquired during the agency, was at first adopted in the English courts, and has since been followed by the courts of many of the United States. The other theory, however, based upon the duty of the agent to disclose to his principal all knowledge and information possessed

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by the agent in relation to the subject-matter of the agency, and therefore charging the principal with it, has since been firmly established by the English courts, and has been adopted by the supreme court of the United States, and by many of the states."

In determining the rule of law that shall apply in this case, in the interest of sound morals, the public welfare and honest business, this court has a most important duty to perform.

To-day probably ninety per cent. of the country's business is conducted or controlled by the corporation. It is not only a business convenience but a business necessity. Its business cannot be conducted by the invisible, intangible, incorporeal body known in the law, but must be conducted by its officers and agents as known to the public.

The agent when duly authorized to act stands in the shoes of his principal for the purposes of the corporation as the principal must be held to stand in the shoes of the agent for the protection of the public.

There is a full and complete merger of identity, a oneness in action and knowledge, of principal and agent. If there be that legal identity as to the act of the agent in behalf of his principal, it must follow by a parity of reason and right that there be that same legal identity as to the agent's acquired knowledge in the doing of the principal's act, and, if so, why should there be either occasion or duty on the part of the agent to communicate the knowledge to his principal—which knowledge by virtue of said identity between agent and principal the principal must be conclusively presumed

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to have? Or, as Mechem has said: "Whatever notice or knowledge, then, reaches the agent under these circumstances [matters within the scope of his authority], in law reaches the principal." Boesel as manager of the bank cannot unknow what Boesel the man all the while knew.

This case is distinguishable from many of those cited in the plaintiff in error's brief, for several reasons.

The agency of Boesel as president and active manager of the bank is admitted; second, what he did as such agent was fully authorized by the bank. This is conclusively established by the fact that the bank at no time repudiated the transaction or questioned the agent's authority, but on the contrary continued to hold said notes, brought suit upon them and is now prosecuting error for a reversal of the judgment below.

Again. In this case it is admitted not only that Boesel as president and active manager of the bank was fully authorized as such to purchase the notes, but that no other person, officer, committee or board of directors needed to take any action whatsoever to complete such purchase.

Again. This is a case in contract, whereas many of the cases cited are those of tort.

In the Innerarity case, *supra*, largely relied on by plaintiff in error, B. was merely a director of the bank. The loan in question was not made by B. He had no authority to make it, but it was passed upon and approved by a board of directors, who, as such board, it was claimed, had no knowledge of the fraud, though B. was present as a member of such board. In an action for tort or

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wrongful conversion, the knowledge of B. was not imputed to the bank. So that this case may be distinguished by these two facts: First, B. was not fully authorized in and of himself to make the loan; second, the action was one in tort.

As to the second leading case, urged by plaintiff in error, *Bank of Overton v. Thompson, supra*, it may be said that Thompson and Hardinger were engaged in a partnership transaction, using the bank as their depository. Hardinger appropriated the moneys of the partnership entirely to his own use, and suit was brought to recover from the bank for the partnership money wrongfully converted by Hardinger. This not only sounded in tort but was a transaction in which the bank was merely acting as bailee or agent of the parties. It surely does not come within the facts of the case at bar, where we have the bargain and sale of a note, by contract, by a duly authorized agent of the banking corporation.

Manifestly, in a case sounding in tort there would be no presumption in law that the wrongful act of the agent was the act of the principal unless actual authority to do the act was proven or a subsequent ratification after all the facts and circumstances of the act were known. No man is presumed to do wrong. There is in fact, in law and in good morals a reason for the distinction that there may not be that legal identity between principal and agent in a case of tort that there is in a case of contract.

In a case of contract, as in the case at bar, there is no need of communicating knowledge, because the principal in law is already conclusively

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presumed to have that knowledge. The principal's liability does not depend upon the agent's duty to communicate, or the likelihood that he will communicate, his knowledge to the principal, but upon the fact that the agent is the *alter ego* of the principal, acting for the principal, and knows that his acts and knowledge *ipso facto* become the knowledge and acts of the principal.

This doctrine of liability based upon the legal identity of the parties is in the main sustained by a number of cases: *Messick & Co. et al. v. Roxbury & Wilcox*, 1 Handy, 190, 191; *Craige et al. v. Hadley*, 99 N. Y., 131, in which the following is a part of the opinion: "Notice to an agent of a bank entrusted with the management of its business is notice to the corporation in transactions conducted by such agent acting for the corporation, in the scope of his authority, whether the knowledge of the agent was acquired in the course of the particular dealing or on some prior occasion."

In *Holden v. New York & Erie Bank*, 72 N. Y., 286, the court in speaking of the duties of the chief managing officer of a bank say: "As a matter of fact, whatever knowledge, information or notice, Ganson had in either of these capacities [managing officer of the bank, individual, or executor], he carried with him into his exercise of the other. As agent of the bank, he owed it a duty in every transaction in which the bank took a part, under his observation. Hence, as a matter of law, whatever notice of facts he had in any capacity, which were material in the performance by him on the part of the bank in any transaction,

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became notice to the bank, his principal, as it was his duty to give it notice thereof in that matter. It is the rule, that the knowledge of the agent is the knowledge of his principal, and notice to the agent of the existence of material facts is notice thereof to the principal, who is taken to know everything about a transaction which his agent in it knows."

National Security Bank v. Cushman, 121 Mass., 490: "If a director of a bank, who acts for the bank in discounting a note, has knowledge that the note was procured by fraud, the bank is affected with his knowledge."

Even in the Innerarity case, *supra*, the court in its opinion uses this language: "A bank or other corporation can act only through agents, and it is generally true that, if a director who has knowledge of the fraud or illegality of the transaction acts for the bank, as in discounting a note, his act is that of the bank, and it is affected by his knowledge."

In *First National Bank v. Blake*, 60 Fed. Rep., 78: "A large number of cases are cited in support of this view, and it is well settled that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be to his interest to conceal, and the corporation or principal is not chargeable with such knowledge. But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction. If Cornish was the sole representative of the bank in the transaction with himself, there was no one from whom infor-

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mation could have been concealed, or to whom it could have been communicated. If he was the sole representative of each party, each must have had equal knowledge."

To the same effect is *Brobston v. Penniman*, 97 Ga., 527. Latter case distinguished in *English-American Loan & Trust Co. v. Hiers*, 112 Ga., 823.

To hold otherwise would open the widest possible door for all sorts of fraud; the more atrocious and aggravated the fraud the less the likelihood of fixing the liability upon the principal. Why? Because the agent would be the less likely to communicate the fact to the principal. Such a holding has no place in sound business or good morals and ought not to be encouraged by our courts.

There was clear error in the trial court sustaining the motion, and the judgment of the circuit court reversing the judgment of the court of common pleas is hereby affirmed and the cause remanded to the court of common pleas for a new trial and for such other and further proceedings as are agreeable to law.

Judgment affirmed.

JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., and SHAUCK, J., not participating.

Statement of the Case.

THE STATE OF OHIO v. McCOY.

Indictment charging shooting with intent to kill, etc.—Includes lesser offenses of assault, etc.—Court in charge to jury omits mention of certain lesser offenses—Of which accused may be found guilty—Judgment of conviction not reversible for court's omission, when—General exception to charge of trial court—Does not raise question of error, when—Criminal law.

1. An indictment charging, in separate counts, shooting with intent to kill and shooting with intent to wound includes the lesser offenses of assault and battery and assault, and upon the trial of the accused upon such an indictment the jury may find the accused not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery or an assault only.
2. Where, upon the trial of a person charged by indictment with shooting with intent to kill and shooting with intent to wound, the court properly charges the jury upon all the issues in the case, except that it inadvertently omits to charge that the defendant might, if the evidence warrants, be found not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery, and the court's attention is not called to this omission, and no request to give such a charge is made, a judgment of conviction of the accused of shooting with intent to wound should not be reversed for such inadvertent omission of the court to so charge.
3. A general exception to the charge of a trial court does not raise any question of error as to the omission of the court to give further correct instruction, but presents only questions of errors of law existing in the charge as given. (*Columbus Railway Co. v. Ritter*, 67 Ohio St., 53, approved and followed.)

(No. 14061—Decided October 7, 1913.)

ERROR to the Circuit Court of Jackson county.

Albert McCoy was indicted by the grand jury at the January term, 1912, of the court of common pleas of Jackson county, Ohio. The indictment

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contained two counts, shooting with intent to kill and shooting with intent to wound. He was tried at the September term following and found guilty of shooting with intent to wound, as charged in the second count of the indictment. A motion for a new trial was overruled and the defendant sentenced. Error was then prosecuted by the defendant in the circuit court of Jackson county, which court at its December term, 1912, reversed the judgment of the common pleas court for the reason as stated in its journal entry, "because the general charge was misleading and failed to instruct the jury as to the lesser degree of assault and battery." The circuit court found no other or further error in the charge except the omission of the trial court to charge that the defendant under this indictment might be found not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery, and for this reason, and this reason only, the circuit court held the general charge misleading.

The state of Ohio now prosecutes this proceeding in error in this court to reverse the judgment of the circuit court.

Mr. Charles H. Jones, for plaintiff in error.

Mr. R. R. Lively, for defendant in error.

DONAHUE, J. The record in this case presents but one question. It is not contended that the charge as given is incorrect in any particular except in the omission of the court to inform the

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jury that under this indictment it might find the defendant not guilty of shooting with intent to kill and not guilty of shooting with intent to wound but guilty of assault and battery. The defendant did not specifically request such a charge to be given, nor did he specifically except to the charge as given, but did except to the charge generally. It is now the settled law of this state that an indictment charging shooting with intent to kill or shooting with intent to wound, or both of these offenses, includes the lesser offenses of assault and battery and assault. *Stewart v. State*, 5 Ohio, 241; *White v. State*, 13 Ohio St., 569; *Heller v. State*, 23 Ohio St., 582; *Marts v. State*, 26 Ohio St., 162; *State v. Johnson*, 58 Ohio St., 417; *Lindsey v. State*, 69 Ohio St., 215.

Section 13692, General Code, provides, among other things, that "When the indictment charges an offense including different degrees, the jury may find the defendant not guilty of the degree charged and guilty of an inferior degree thereof."

Section 13675, General Code, regulates the procedure in the trial of criminal cases. Paragraph 7 of that section requires that after the argument is concluded and before proceeding with other business the court shall forthwith charge the jury. This statute was passed after the decision of this court in the case of *Jones v. State*, 20 Ohio, 34, and the conclusion reached in that case was predicated upon the fact that there was then no rule of law requiring the court of its own motion to instruct the jury. For that reason that case has no application to the case at bar, because Section 13675, General Code, now makes it the

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duty of the trial court to charge the jury forthwith upon the conclusion of the argument, and this of course means that the court shall charge upon all the issues in the case. The doctrine announced in the case of *B. & O. Railroad Co. v. Lockwood*, 72 Ohio St., 586, adds nothing to the force of this statute, for any fair construction of the language used in this section means just what was held in that case. True, the decision reached there was predicated upon the statement that "The code of civil procedure carefully distinguishes issues of fact which may be tried by a jury and issues of law or fact which must be tried by the court." But undoubtedly the rule would apply to criminal as well as to civil cases. Therefore, it is now a settled rule of practice in this state that it is the duty of the trial court, both in criminal and civil cases, to separately and definitely state to the jury the issues they are to try, accompanied by such instruction as to each issue as the nature of the case may require. Measured by this rule this charge is defective in that it fails to definitely cover all the issues in the case. It is equally a settled rule of practice in this state that where the charge as given is free from prejudicial error but fails to cover all the questions involved in the case, such failure is not a ground for reversal unless it was called to the attention of the court and further instructions requested and refused, provided the jury is not misled by the charge as given. *Columbus Railway Co. v. Ritter*, 67 Ohio St., 53; *Schryver v. Hawks and Bierce*, 22 Ohio St., 309; *Smith v. P. Ft. W. & C. Railway Co.*, 23 Ohio St., 10; *Pretzinger v. Pretzinger*, 45 Ohio St., 452; *Rolling Mill Co. v. Corrigan*, 46 Ohio St., 283.

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It does not appear how the jury could have been misled by this charge. The court did give a correct charge covering the offense of shooting with intent to wound, and the defendant was found guilty of that offense. That he might, under such an indictment, be found guilty of assault and battery, would in no wise aid the jury in determining his guilt or innocence of the charge of shooting with intent to wound. It may occur in actual practice that a jury, seeking to avoid a disagreeable duty, might be inclined to find the defendant guilty of a lesser crime than the evidence warrants, but there is no justification in law for the jury so doing, and the presumption is that the jury does its duty in that respect and proceeds in the orderly consideration of the cause submitted, and that it is only when it determines that the accused is not guilty either of shooting with intent to kill or not guilty of shooting with intent to wound that it comes to the consideration of his guilt or innocence of the lesser offenses, included in this indictment. In such event it would seem that it would be to the interest of the accused and to the prejudice of the state for the trial court to neglect to charge that the accused might be found guilty of assault and battery, for if the jury determine that he is guilty of neither of the major offenses charged it would not then consider his guilt or innocence of the included offense of assault and battery, but would pass to the consideration of the next lesser offense of assault only.

This court, however, did hold in the case of *Beaudien v. The State of Ohio*, 8 Ohio St., 634, 635, that it was error prejudicial to the accused

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for the court to charge the jury upon the trial of an indictment for murder in the first degree that if the jury should find the defendant guilty of the homicide it must find him guilty of murder in the first degree. The charge in that case, however, peremptorily limited the authority of the jury to determine the grade of the homicide. Upon a plea of not guilty and a trial upon the issues so joined by the averments of the indictment and such plea, it is the province of the jury, not the court, to determine the grade of the offense, and in such case the court cannot deny to the jury the power of rendering such verdict as its judgment and conscience may dictate. *Adams v. State*, 29 Ohio St., 412. The charge, therefore, as given was clearly erroneous and not merely an omission to give a correct charge pertinent to the issue, and we think this court very properly held that such peremptory limitation of the jury's right and authority to fix the degree of the homicide was prejudicial to the defendant. In this case the charge as given contained no such error, and while the court should have given the further charge in relation to assault and battery, yet mere failure to give further proper instructions is not the equivalent of the giving of an erroneous charge, nor is it the equivalent of a refusal to give a proper charge when requested.

Counsel for the accused did not call the court's attention to its omission to charge in reference to assault and battery. He did not even specifically except to the charge for that reason.

In the case of *Columbus Railway Co. v. Ritter*, *supra*, Judge Price in the opinion calls attention to

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the duty of counsel as well as to the duty of the court, and among other things very pertinently says: "The court may neglect or omit to fully instruct upon some important issue or issues in the case, and in that event, comes the duty of counsel, in order that full and complete justice be done, to call the attention of the court to such omission and request the further charge desired." Any other rule than this would be a positive hindrance to the administration of justice. Undoubtedly it is the duty of a trial court to afford the accused a fair and impartial trial, and to that end should carefully and fully charge upon every issue in the case. But there are some responsibilities resting upon counsel. It is his duty to aid the court in the administration of justice, and he cannot be permitted to take advantage of his own wrong or his own dereliction. When a court makes a fair and honest effort to charge the jury fully and correctly on all the issues in the case but unintentionally and inadvertently omits to charge with reference to some issue, and particularly an issue that has not been prominent in the trial of the cause, counsel may not sit by in silence without making any effort whatever to secure such charge to be given and then demand a reversal of the judgment by reason of such mere inadvertance or oversight of the court.

However that may be, this record does not present to this court the questions sought to be made by counsel for defendant in error. It is a well-settled rule of practice in this state that a general exception to the charge as given does not present to the reviewing court any errors of the trial court in failing to give further instructions.

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Section 11561, General Code, provides that "A general exception taken to a charge of a court shall apply to all errors of law *which exist in such charge* that are material and prejudicial to the substantial right of the party excepting." Prior to the enactment of this statute it was uniformly held that where exceptions were taken to a general charge, unless the party excepting pointed out specifically the part or proposition of the charge excepted to, or the ground of his exception, a reviewing court was not bound to take notice of the exceptions. *Adams v. State*, 25 Ohio St., 584; *Marietta & Cincinnati Railway Co. v. Strader & Co.*, 29 Ohio St., 448; *Adams v. State*, 29 Ohio St., 412; *P. Ft. W. & C. Railway Co. v. Probst*, 30 Ohio St., 104; *Western Insurance Co. v. Tobin*, 32 Ohio St., 77.

Section 11561, General Code, changes this established rule of practice only to the extent and only in the particulars mentioned. In the case of *Railway Company v. Ritter*, *supra*, this court held that by the clear and unambiguous language of this section (11561, General Code), a general exception taken to any charge of the court applies only to errors of law which exist in such charge and does not reach an omission or failure to give further correct instructions. The second proposition of the syllabus in that case fully and emphatically disposes of this question and leaves no chance for further contention in reference thereto. That paragraph of the syllabus reads as follows: "A general exception to the charge of the court as now permitted by Section 5298, Revised Statutes [Section 11561, General Code], is effectual only as

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to errors or law *existing in the charge as given*, and does not bring in review on error, an omission or failure to give further proper instructions."

In the case of the *State of Ohio v. Schiller*, 70 Ohio St., 1, Judge Crew in discussing this question, page 8, uses this language: "The only exception taken or noted by counsel for defendant, is a general exception to the charge as a whole. It is a familiar and very general rule of practice, applicable alike to criminal and civil causes, that mere partial non-direction, or incomplete instruction, as to a particular matter or issue, does not of itself constitute reversible error, in the absence of a request for more specific and comprehensive instructions upon the particular point or issue involved." This, we think, is a proper statement of the law and is dispositive of this case.

Judgment of the circuit court reversed and judgment of the common pleas court affirmed.

SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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THE CITY OF AKRON *v.* ROTH.
THE CENTRAL NATIONAL FIRE INSURANCE
COMPANY *v.* J. R. ROBERTS & SON.

Supreme court jurisdiction—To review judgments of cases in lower courts—Cases pending in the circuit courts on January 1, 1913, subject to appeal to and review by supreme court, when—All cases pending in the courts of common pleas on January 1, 1913, subject to review only by court of appeals except, when—Limitation of seventy days from date of judgments of court of appeals—For filing of application for hearing in supreme court except, when—Court procedure—Rules for advancement from lower to upper courts.

1. In determining the manner in which the exercise of the authority of this court to review judgments of the court of appeals in "cases of public or great general interest" under the constitutional amendments of 1912 shall be invoked conclusive effect should be given to the following provisions of the fourth article which relate especially to that subject: "In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals;" and "All pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law, and cases brought into said court of appeals after the taking effect hereof shall be subject to the provisions hereof." In order that such effect may be given them, the provision of the final schedule that "all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law" must be regarded as meaning that all cases pending in the several courts of the state shall proceed in such courts according to existing procedure.
2. In the procedure prescribed by the provisions of the fourth article all judgments which the court of appeals may render in cases involving questions arising under the constitution of the United States or of this state, in cases of felony (on leave first obtained) and in cases which originated in the court of appeals,

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without regard to the time when the cases may be brought into that court, there may be a review by this court by proceedings in error instituted in accordance with the laws in force January 1, 1913; and the same course may be taken for the review of judgments of the court of appeals in cases of public or great general interest, if the cases were pending in the circuit court on said first day of January.

3. As to cases brought into the court of appeals after said first day of January, a proceeding to obtain a review by this court of a judgment of the court of appeals in a case of public or great general interest, and not within our jurisdiction for any other reason, must be instituted by an application for an order of this court directing the court of appeals to certify its record in the case to this court, such application to be made by motion showing from the record (a) that the case is of public or great general interest, and (b) that error has probably intervened; notice of such motion to be given in accordance with the general rule.
4. No limitation as to the time of making such application having been prescribed by law, a limitation of seventy days from the date of such judgments in cases of public or great general interest as the court of appeals may hereafter render is hereby prescribed, and in cases of that character in which the court of appeals has already rendered final judgment since said first day of January, including the cases in which the motions now under consideration are filed, applications may be made at any time before the first day of January, 1914.
5. All proceedings in error instituted here for the review of judgments of the court of appeals in cases not within our jurisdiction, except as they may be cases of public or great general interest, and instituted without obtaining an order of this court to the court of appeals to certify its record, will be dismissed, but without prejudice to the right of the aggrieved party to apply here for such an order in accordance with propositions 3 and 4 of this syllabus. All motions to dismiss proceedings in error instituted here in accordance with the practice prescribed for proceedings in error by the law in force on the first day of January, 1913, in cases which at that date were pending in the circuit court will be overruled.

(Nos. 14222 and 14242—Decided October 7, 1913.)

ERROR to the Circuit Court of Summit county.

ERROR to the Circuit Court of Portage county.

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Facts are stated in opinion.

Mr. Jonathan Taylor, city solicitor, for plaintiff in error, the city of Akron.

Mr. J. A. Kohler and *Mr. W. R. Talbot*, for defendant in error, Roth.

Mr. J. L. Kohl and *Mr. H. R. Loomis*, for plaintiff in error, insurance company.

Mr. W. J. Beckley and *Mr. R. S. Webb*, for defendant in error, J. R. Roberts & Son.

SHAUCK, J. The two cases entitled, and numerous others of which they are types, are submitted on motions to dismiss the petition in error. In the case firstly entitled, the judgment of the court of appeals, whose reversal is sought, was rendered in a case that was pending in the circuit court of Summit county on the first day of January, 1913.

In the case secondly entitled the judgment of the court of appeals, whose reversal is sought here, was rendered in a cause not pending in the circuit court at that day but taken to the court of appeals on the 18th of February, 1913.

The petitions in error in both of these cases have been filed here with copies of the record in accordance with the practice which had grown up under the provision of the constitution of 1851 relating to the appellate jurisdiction of this court

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and the statutes passed pursuant thereto. The questions for determination arise out of the amendments to the constitution made in September, 1912, and the motions to dismiss are predicated upon the theory that by those amendments the cases are either excluded from our jurisdiction or are required to be brought here only by some resort to this court to invoke its authority to order the circuit court to send to us a transcript of its record.

The questions chiefly arise out of the amendment to the fourth article of the constitution then adopted which relates to the vesting and the exercise of the judicial power of the state. The article, as is admitted, became effective January 1, 1913. The second section of the article contains a formal grant of jurisdiction to this court as follows: The supreme court "shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law." Then follow in the same section provisions relative to the election of the judges and the manner in which the jurisdiction of the court shall be exercised. Later in the same section there is the following provision: "In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to

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certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals." The provision lastly quoted, though separated by many provisions from the formal grant of jurisdiction, must, we think, be regarded as bringing within our jurisdiction cases of public or great general interest decided by the court of appeals, though brought into that court after the first of January. The question chiefly discussed is whether the proceeding in cases brought from that court to this may be prosecuted according to the substance and forms of the proceeding in error formerly in vogue. That they may be was assumed by those who have instituted the proceedings. And in support of that view it is urged that all cases pending in any of the courts of the state on the first day of January, 1913, were, as to the judgments therein rendered, subject to proceedings in error instituted in the reviewing courts of the state successively, according to the former practice. This conclusion is said to be justified by the following provision contained in the last of the schedules to the submitted amendments: "Provided that all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law." The view presented, it must be admitted, is favored by the use of terms which without words of severalty embrace all the courts of the state. But whatever conclusion might be required by this inartificial provision, if no other consideration intervened, it may be required in order to give effect to all contemporaneous and cognate pro-

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visions that this shall be regarded as meaning that all cases pending in the several courts of the state shall proceed in such courts according to the law then in force. This interpretation would not deny a definite purpose to the provision and it may be required by an application to the entire body of the amendments of a familiar rule of interpretation. The rule is that special provisions relating to a subject will control general provisions in which, but for such special provisions, the subject might be regarded as embraced. The subject of inquiry is the jurisdiction of this court to review judgments of the court of appeals and the manner in which that jurisdiction shall be invoked and exercised. The following provision relating specially to that subject is found in Article IV of the amendments: "All pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law, and cases brought into said courts of appeals after the taking effect hereof shall be subject to the provisions hereof." Certainly the same proceeding in error could not be prosecuted in both the court of appeals and the supreme court, since to secure a review in the latter court would require the institution of a proceeding in error for that purpose. But the same observation may be made respecting the view based upon the provision of the last schedule. That view would, as this does, require the assumption that the word "case" is used in its fireside signification of a controversy that is litigated, without distinction between cases and proceedings and without regard

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to the point reached in the prosecution of the controversy through the several courts of the state. It seems to be conclusive of the question that effect cannot be given to all the terms of the provision quoted from Article IV without concluding that the judgments which the court of appeals may render in cases or proceedings brought into the circuit court prior to the first day of January, 1913, may be reviewed in this court upon a petition in error filed here as a matter of legal right and in accordance with the former practice.

It seems to be quite clear that the judgments of the court of appeals in proceedings in error which were begun in that court after January 1, 1913, may be reviewed here only upon the condition and in the manner prescribed in the fourth article as amended, and the entire sentence quoted from that article denotes an evident purpose to make some distinction in that particular between error proceedings instituted in the circuit court before and those instituted in the court of appeals after January 1, 1913, if they are entitled to consideration here for no other reason than that they are cases of public or great general interest. The condition expressly prescribed is that they shall be cases of that character and the manner in which our jurisdiction is to be invoked and exercised is indicated only by the following provision: "The supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals."

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The limitation of time which the legislature is authorized to prescribe has not been prescribed, as we are informed by industrious counsel who have searched through the last volume of the acts of the general assembly. The limitation prescribed by the terms of the amendment seems to be upon the action of the court and not upon the party who invokes the action, and it is entirely silent as to the manner in which the exercise of the jurisdiction to review cases of the character contemplated shall be invoked. In this situation we can get no light from a consideration of the evils to be remedied or the benefits to be accomplished, for, so far as we are aware, the evil of too frequent resort to this court was the only evil contemplated and the prevention of that, if nothing further was desired, would have been naturally accomplished by an amendment to the statute requiring proceedings in error in cases of that character to be instituted here only upon motion and leave granted.

Careful consideration is due the view that the jurisdiction of this court to review the judgments of the court of appeals in cases of public or great general interest may be invoked by a petition in error filed on leave, such leave to be granted on an application showing that the case is of public interest and so within our jurisdiction and that substantial error has probably intervened. All else of our jurisdiction in error is conferred in the general and formal grant found in the earlier portion of the section of the amendment quoted. It is conferred under the designation of "appellate jurisdiction" in the same terms that were used in the constitution of 1851, laying the foundation of

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the practice in error which has been adhered to for more than half a century. It is said that a generation familiar with the writ of *certiorari* abandoned it for the simpler review by proceedings in error, and that in the amendments there is no suggestion of an intention to return to it for the reviewing of cases involving constitutional questions or cases originating in the court of appeals, and that since all of these cases will continue to be brought here by the proceeding in error as formerly it should not be assumed that it was designed by the amendments to introduce the confusion of two modes of proceeding to invoke the exercise of the supreme court's jurisdiction in error. The suggestion is of obvious force, and it should be regarded as conclusive if the language by which we are authorized to review cases of public interest were so vague as to admit of interpretation. Whatever may be thought of the character of the amendments submitted in September, 1912, or of the time and manner of their submission, or of the small minority vote by which they were ratified, those of them which were ratified are entitled to full recognition as parts of the organic law of the state. If we are asked how the character of a case decided by the court of appeals can be made more clear by a record sent here pursuant to our order than by the same record presented by the party who seeks to have it reviewed, we are permitted to answer that we do not know. If the inquiry is why we ignore the records voluntarily presented by the parties and insist that an order from this court to the court of appeals to certify its record to us is a pre-

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requisite to the review of cases of this character, it is a sufficient answer that it is so ordained. There can be no equivalent to a constitutional requirement. Authority to review causes of public interest is not embraced within the general grant of our jurisdiction. It is conferred as an authority to be exercised at our discretion, the authority to review to be preceded by our order to the court of appeals to certify its record to us.

The authority to review cases of this character is conferred by the terms of the amendment, apparently leaving the court to determine the manner in which its exercise shall be invoked. The legislature is authorized to prescribe the limitation of time within which the order shall be made, which should be taken to mean the time within which it may be applied for. The authority so conferred upon the legislature not having been exercised, the entire subject seems to be within our authority to prescribe such rules as are consistent with law for the proper institution of cases here and their conduct before us. No limitation having yet been prescribed for invoking our authority with respect to cases of this character, a limitation of seventy days is now prescribed in analogy to the statute applicable to other cases in error but not to so operate as to prevent a review of judgments of the court of appeals in cases which were brought into that court after the first of January, if they are cases of public or great general interest. Opportunity should now be granted for a resort to this court in accordance with the mode required by the amendment for cases of this character and with the rule herewith

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prescribed. Although the petitions in error in cases of this character having been filed without authority as required by the amendment must be dismissed, that dismissal will be without prejudice to the rights of complaining parties to apply here for orders requiring the court of appeals to certify the records to us.

Having thus stated our views of the provisions affecting the questions before us, we refer counsel and the bar of the state to the syllabus prefixed to this report for a definite statement of the rules prescribed.

The motion in the case first entitled will be overruled and in the other case it will be sustained.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

THE COLUMBUS CITIZENS TELEPHONE CO. *v.* THE CITY OF COLUMBUS.

Municipal corporations—Compensation by telephone company—For use of streets—Franchise stipulation for percentage of gross annual receipts—Not an assessment for general revenue, when.

1. A municipality has the power to demand and receive from a telephone company, for the privilege of digging ditches and laying and maintaining subsurface conduits for telephone wires under its streets, compensation beyond what is necessary to restore the pavement to its former state of usefulness. (*City of Columbus v. The Columbus Gas Co.*, 76 Ohio St., 309, approved and followed.)
2. A stipulation in the ordinance granting the privilege, which requires the company to pay, among other considerations, a certain percentage of its gross annual receipts into the municipal treas-

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ury for the use of the general expense fund, to which the company assented, though under protest, is not an assessment for general revenue in the nature of a tax.

(No. 13303—Decided October 14, 1913.)

ERROR to the Circuit Court of Franklin county.

Facts are stated in opinion.

Messrs. Daugherty, Todd and Rarey, for plaintiff in error.

Mr. Stuart R. Bolin and *Mr. E. L. Weinland*, city solicitors, and *Mr. B. W. Gearheart*, assistant city solicitor, for defendant in error.

WILKIN, J. The city sued the telephone company for a percentage of the latter's receipts for the year 1904, upon a contract pursuant to the ordinance of the city, wherein the telephone company agreed to pay a percentage of its gross receipts annually in consideration of a grant to the latter company of the privilege to use the streets and other public ways for the period of twenty-five years, for the purpose of digging trenches and laying conduits therein necessary to successfully construct and operate a telephone exchange, toll lines and police and fire-alarm system. The telephone company installed its system, and thereafter paid to the city the stipulated percentage of the gross receipts according to contract for the years 1901, 1902 and 1903, but upon demand for the percentage for 1904, refused to pay.

The company answered the petition, setting up two defenses. The major proposition of law upon

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which the answer rests is that the city is without the power to demand or receive compensation for the use of its streets or other public ways beyond what may be necessary to restore the pavement to its former state. Section 9179, General Code. Another section provides that the mode of such use shall be such as is agreed upon between the city and the company; and if they can not agree, the probate court shall direct in what mode the telephone line shall be constructed along such streets or public ways, so as not to incommode the public. Section 9178, General Code.

It has been decided by this court that "The statutes of Ohio do not confer power on the probate court to grant to a telephone company the right to put its wires and apparatus in conduits *under the streets* of a city in the absence of consent by the municipal authorities." *Queen City Telephone Co. v. City of Cincinnati*, 73 Ohio St., 64. Therefore these sections do not apply to an agreement for the use of subsurface conduits.

There is a statute which provides that gas, electric and water companies may lay conductors for supplying gas, electricity and water through the streets, lands and squares of a city, with the consent of the municipal authorities, under such regulations as they may prescribe. Section 9320, General Code. And this court has held that the council of the city may require a gas company, to which it grants the right to lay its pipes and other appliances in the streets and other public places, to pay annually to the city a reasonable sum to compensate for the city's necessary supervision after as well as during the construction of the

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system; and when the company accepts the terms of the grant according to law and occupies the streets under such grant, such acceptance becomes a valid contract between the parties for the annual payment of said sum; and also that a provision in the grant that said payments are "for the benefit of the gas and light fund," does not render the ordinance invalid as a means to raise general revenue, said clause being subordinate to the principal obligation. *City of Columbus v. Columbus Gas Co.*, 76 Ohio St., 309.

Now it is true that the statute last referred to does not *ex vi termini* apply to telephone companies. Nor does the statute upon which the telephone company relies in this case apply to the kind of use which the company makes of the public avenues of the city of Columbus. The plant which it installs in the streets of the city is analogous to that of gas companies. By the statute law of the state, municipalities are required to keep their streets open, in repair and free from nuisance, and they are liable in damages for injuries caused by their failure so to do. In this respect a system of subsurface conduits is very different from overhead lines upon poles, as it casts upon the city greater labor, care and expense. By analogy, therefore, the stipulation for annual compensation in the contract in the case at bar, is as reasonable and should be as valid as the stipulation in the ordinance in the case last cited. It is a reasonable exercise of the power of the municipal corporation to exercise care and control of its streets and public areas. Section 3714, General Code. The last clause of Section

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9320, "under such reasonable regulations," being in the nature of a limitation upon the power of the municipality to confer upon private companies the use of its thoroughfares, by inference enjoins upon the city the duty to make proper provision for the cost of supervision and repairs rendered necessary by the operations of such companies in and *under* its streets. Compare Section 9170-1, General Code.

It follows therefore that the legal proposition of the telephone company, which is the major premise of its defense, is untenable, and the demurrer to its answer upon that ground was justly sustained.

The other proposition underlying the second defense is that the payments of a percentage of the gross receipts of the telephone company is a tax for a general revenue, which is unauthorized. This proposition is based upon a clause in the ordinance, and in the contract pursuant thereto, that the company shall "pay into the city treasury for the use of the general *expense* fund of the city, a percentage on its gross receipts," etc. This court has held in the case of *City of Columbus v. Columbus Gas Co.*, *supra*, that such a clause does not render the ordinance invalid, and of course it should not nullify the contract. In that case the annual stipend was by ordinance transferred to the "general expense fund."

In their brief counsel for the company hark back to the time when the company applied for this grant and when this ordinance was passed, and assert that the company was "held up." This would be a petty and futile plea of duress if it

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were set forth in the answer. The argument in the company's brief that this clause was an unjust "exaction," because a rival company might be permitted to use the streets without being subject to such payment, is not legitimate and is not proper for our consideration. See second proposition of the syllabus, *City of Columbus v. Columbus Gas Co.*, *supra*.

The debtor company accepted the grant and acquiesced in its terms during three years, and has enjoyed all its privileges and emoluments. The company was free to promise the annual payment or refuse the grant. Certainly the demand for a debt thus voluntarily incurred as a recompense for a grant can with no propriety be called a tax in any sense. A tax is imposed by sovereign power; it creates an involuntary obligation.

The company alleges that it did not recognize the legality of this obligation, because it paid for the years 1901, 1902 and 1903 under protest in writing. The answer to this proposition is found in the syllabus to *Mays v. City of Cincinnati*, 1 Ohio St., 268, viz.: "To make the payment of an illegal demand involuntary, it must be made to appear that it was made to release the person or property of the party from detention, or to prevent a seizure of either by the other party having apparent authority to do so without resorting to an action at law." It does not so appear.

The company by its answer and in its brief makes the point that the stipulation for the payment of a percentage of its earnings was no part of the consideration for the grant or for recompense for the use of the streets, because by the

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provisions of the ordinance and by the covenants in the contract pursuant thereto the company was bound to restore the streets to as good condition as they were in prior to the operations of the company, under the direction and to the approval of the city engineer; and on failure so to do the city engineer might do such work and collect the expenses thereof, with cost of collection, from the company. And the company also gave bond in \$50,000, with sureties, conditioned that it shall indemnify the city against loss and liability for any claims against the city for injury to persons or property growing out of the enjoyment of the privileges granted; and that the company shall perform all the conditions of said contract on its part to be performed.

A sufficient reply to this argument is that these covenants do not cover all the duties and liabilities which devolve upon the city from the construction of this telephone and fire-alarm system beneath her streets; she had a right to stipulate for recompense for the extra burden of supervision and repair *after* the plant was installed and the streets were restored to their former condition. This right is recognized, by implication at least, in the case which counsel for the company cite to support their point. *City of Zanesville v. Zanesville Telephone & Telegraph Co.*, 64 Ohio St., 67.

The demurrer to the second defense was properly sustained. The judgment of both courts below should be affirmed.

Judgment affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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PFEIFER ET AL. v. GRAVES, SECRETARY OF STATE.

Constitutional law—Initiative and referendum—Initiated bill introduced in house—Referred to committee and amended—May be submitted to electors, when—Amendments are incorporated in proposed law, when—Section 1b, Article II, Constitution of 1912, construed, how—Constitutionality of a proposed law will not be determined, when.

1. An initiated law, which has been introduced into the house of representatives, in compliance with Section 1b of Article II of the revised Constitution of 1912, and referred to the proper committee, which reported it back with amendments which were agreed to by the house, which took no further action upon it, may be submitted as thus amended to the electors of the state in due time after a supplementary petition properly signed and verified has been filed with the secretary of state demanding its submission in its amended form.
2. Amendments to the proposed law, thus reported and agreed to, are thereby incorporated in it as required by said section.
3. In a proceeding against the secretary of state, to enjoin the submission as aforesaid, the section will not be rigidly construed so as to exclude the submission for the reason that the bill as amended was not enacted by the house.
4. The language of Section 1b is to be fairly and reasonably interpreted so as to carry out the purpose of the people who adopted the dual form of direct and indirect legislation prescribed therein.
5. This court has no authority to pronounce an opinion, a judgment or a decree upon a mere moot question as to whether a proposed law will conflict with the Constitution, if it shall be enacted by the general assembly, or be adopted by the people.

(No. 14412—Decided October 14, 1913.)

Error to the Court of Appeals for Franklin county.

Ten days prior to the regular session of the Eightieth General Assembly, a petition duly signed and verified as required by Section 1, Ar-

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ticle II of the Constitution, was filed with the secretary of state, to initiate a proposed law set forth therein, which was entitled thus:

"To Prohibit the Shipment, Conveyance or Receiving of Intoxicating Liquors into Territory in which the Sale of Intoxicating Liquors as a Beverage is Prohibited."

This petition was duly transmitted to the general assembly by the secretary of state and was introduced in the house of representatives as house bill No. 3, on January 14, 1913. On the next day it was referred to the committee on liquor traffic and temperance and the committee reported it back to the house with certain designated amendments on the 16th day of April. Immediately following the report of the committee as set forth in the house journal, is this clause: "The amendments were agreed to;" after which appears the following: "The bill was ordered to be engrossed and read the second time in its regular order."

No further action on the bill was taken by the house. Within ninety days after final adjournment of the general assembly additional names of more than 3 per cent. of the electors of the state were signed to a supplemental petition demanding that the proposed law thus initiated and as amended be referred to the people for their adoption or rejection at the next regular election, as provided by Section 1b of Article II of the Constitution, and the same was on July 25th filed with the secretary of state.

On the 29th day of September, 1913, the plaintiff, John Pfeifer, on behalf of himself and other citizens and taxpayers in like situation, filed a

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petition in the court of common pleas of Franklin county, setting forth the original initiated bill and the bill as modified by the insertion of the amendments recommended by the committee and adopted by the house. The petition alleges that the proposed law was not passed by the general assembly, either in its original or amended form, nor was any amendment incorporated therein, and if adopted by the electors of the state it would be in conflict with the Fourteenth Amendment of the Constitution of the United States, and with Sections 1, 2, 14 and 19 of the Bill of Rights and Section 26, Article II of the Constitution of Ohio; that the submission of the proposed law at the election to be held November 4, 1913, will involve the useless expenditure of public moneys of the state, and that the plaintiffs are without adequate remedy at law and will be irreparably injured unless the court gives them relief. Wherefore the plaintiffs pray that the court decree that the proposed law, if adopted by the electors, would be unconstitutional and void, and that the secretary of state be enjoined from submitting it to the electors and from doing any act in respect thereto.

The defendant secretary of state answered, denying that the amendments were not incorporated in the proposed law and that it would be unconstitutional and void if approved by the electors of the state as initiated in the supplementary petition; he alleges that the words and phrases inserted therein, which were not in the proposed law as set forth in the original petition, are amendments which were incorporated in it by the house of representatives of the Eightieth General As-

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sembly, and he admits each and every other averment in plaintiff's petition.

The plaintiffs reply, denying that the words and phrases referred to in the answer are amendments incorporated in the law originally proposed and that it is the law originally petitioned for, with amendments incorporated by the house of representatives.

The court of common pleas refused the relief prayed for and dismissed the petition. On error proceedings to the court of appeals this judgment was affirmed. The cause is now brought to this court for a reversal of the judgments below, and for an order as prayed for in the petition.

Mr. A. J. Freiberg and Mr. George B. Okey, for plaintiffs in error.

Mr. Timothy S. Hogan, attorney general; *Mr. Clarence D. Laylin and Mr. W. B. Wheeler*, for defendant in error.

WILKIN, J. The matter we have to deal with belongs to the realm of Public Law. We have not now to decide a conflict between individual members of society, nor to determine the status and legal relations of legal bodies or social groups within the state, nor to regulate the affairs of mere official administration. We have to define a branch of the law of the being of the state itself. Our inquiry is, therefore, not hampered by scruples about "the inherent and inalienable rights and liberties of persons." The contention is between citizens of the state and the state itself,

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and the question is whether its constitutional system of legislation is about to be perverted in the particulars complained of.

We have to conceive first what the initiative is; what is the nature and mode of operation of the Ohio type of this political device. And we are to get our conception of it, not from our intuitions of what it ought to be, but from what the people have declared it to be, in Article II of the Charter of State, particularly in Sections 1 to 1g. Next we have to conceive *the principle* which is involved in the mechanism, from the nature and function of it as an organ of government; and then, third, consider for what *purpose* the architects of our form of government devised this method of legislation for the state.

When we have a true and definite conception of the kind of direct legislation which this amendment has grafted upon the old style of indirect legislation, we need not stick in the shell of words by which this dual method is described in the document. Having determined the nature and purpose of this part of the machinery of government, we have only to interpret the verbal account of its operation so as to effect that purpose according to the essential nature of the thing. We extract the pertinent parts of the constitution as revised:

"ARTICLE II.

"Sec. 1. The legislative power of the state shall be vested in a general assembly * * * but the people reserve to themselves the power to propose to the general assembly laws * * *

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and to adopt or reject the same at the polls. * * * They also reserve the power to adopt or reject any law, * * * passed by the general assembly, except * * *.

"Sec. 1a. The first aforesated power reserved by the people is designated the initiative * * *.

"Sec. 1b. When * * * not less than ten days prior to the commencement of any session of the general assembly, there shall have been filed with the secretary of state a petition * * * proposing a law, * * * the secretary of state shall transmit the same to the general assembly as soon as it convenes.

"[Clause 2.] If said proposed law shall be passed by the *general assembly*, either as petitioned for or in an amended form, it shall be subject to the referendum.

"[Clause 3.] If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken thereon * * * it shall be submitted by the secretary of state to the electors for their approval or rejection at the next regular or general election, if such submission shall be demanded by supplementary petition verified * * * and signed * * *.

"[Clause 4.] The proposed law shall be submitted in the form demanded by such supplementary petition, which form shall be either as first petitioned for or with any amendment or amendments which may have been incorporated therein by *either branch* or by both branches of the general assembly.

"Sec. 16. * * * Every bill *passed by the general assembly* shall, before it becomes a law,

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be presented to the governor for his approval. If he approves, he shall sign it, and thereupon it shall become a *law* and be filed with the secretary of state.

"Sec. 1c. The second aforestated power reserved by the people is designated the referendum * * *.

"[Clause 2.] No *law* passed by the *general assembly* shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except * * *.

"[Clause 3.] When a petition, signed * * * and verified * * * shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that *such law* * * * be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law * * *.

"Sec. 1g. Any initiative, supplementary or referendum petition may be presented * * * shall contain * * * the law * * * sought to be referred, or the proposed law * * *.

"[Clause 9.] Upon all initiative, supplementary and referendum petitions * * *.

"[Clause 11.] * * * persons who prepare the argument * * * *against* any *law* submitted * * * by referendum petition * * * and the persons who prepare the argument * * * *for* any *proposed law* * * * may be named in the petition * * *.

"[Clause 12.] * * * persons who prepare the argument * * * *for the law* * * *.

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submitted * * * by *referendum* petition, or *against* any *proposed* law submitted by *supplementary* petition, shall be named by the general assembly * * *.

"[Clause 16.] The style of all laws submitted by the initiative and supplementary petition shall be: 'Be it Enacted by *The People* of the State of Ohio.'"

Be it observed that these excerpts provide for three stages of a statutory law, and for three sorts of petition.

The old constitution provided for indirect legislation by a representative assembly of citizens chosen for that function. The original idea of direct legislation by initiative and referendum was, to proceed at once to the people with a proposal that *they* ordain a law set forth in the proposal, or to repeal a law therein set forth already enacted by the legislature. The Ohio plan, embodied in the amendment of Article II, Sections 1 to 1g, is an amalgamation of the direct and indirect methods.

A proposed law is first initiated by a petition filed with the secretary of state, who transmits it to the general assembly (if the petition be properly signed and verified), where it is introduced as a *bill*; if both bodies adopt and pass it as proposed it becomes an *act*, and when it is enrolled and filed by the governor with the secretary of state it becomes a *law*, but subject for ninety days to the referendum, which means that it may be referred to the people for their approval or rejection at the next general election. If a referendum be not taken within ninety days after the law is

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filed with the secretary of state, the law stands. If a referendum be called and the law be approved by the electors, then it goes into effect at once, but if it be rejected, it becomes a nullity.

Now, going back to the time the bill is pending before the legislature, either house may amend the bill and both houses may pass it as amended; then it becomes a *law* subject to the referendum as aforesaid. But at this stage it is also subject to the second initiative; that is, it may be treated, not as a law, but as a proposed law, in either of two respects—it may be considered in its amended form as a law proposed by the legislature, or the amendments may be disregarded and the original proposal may be taken up. In either form it may be presented the second time to the secretary of state by a *supplemental* petition (properly signed and verified), and he shall submit it to the electors of the state for approval or rejection.

So far we have considered two contingencies—the original bill passed and the bill amended and passed, *by the general assembly*. But a third contingency may arise, namely, the bill may not be passed in any form, *by the general assembly* (both branches). In this contingency the bill in its original form or in its amended form may be initiated the second time by supplemental petition and submitted directly to the people as aforesaid. We have now considered all contingencies that clearly seem to be provided for by the second and third clauses of Section 1b.

It will be observed these clauses mention only what may be done or not done to the proposed law

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by the general assembly. Whether that phrase must be taken in its collective sense, as including both houses in the contemplation of both clauses where amendment of the law is mentioned, we do not find it necessary to consider now. In this case the only amendments asserted are those alleged to have been made by the lower house; and the fourth clause, on which both sides of the controversy rest their claims, provides for "amendments which have been *incorporated* [in the bill] by either branch or by both branches of the general assembly." It is perfectly manifest, therefore, that one purpose of this revision of Article II is to give either or both branches of the legislature a chance to consider a proposed law, and to propose amendments to it, before it is submitted to the people by the initiative or the referendum. When the amendments are incorporated by either house, they are submitted by the second initiative. When the amendments are incorporated and the law is passed by *both* houses, the bill thus amended may be submitted by the referendum. In the latter case they have been made a part of the *law passed by the general assembly* and must be referred with it (Section 1c and clause 2 of Section 1b). In the former case (the initiative), they may or may not be submitted, at the option of the supplementary petitioners.

Now we come to the precise question in controversy: Were these amendments "*incorporated*" in this *proposed* law by the lower house where it was introduced as house bill No. 3?

That the amendments reported by the committee to which the bill was referred were agreed to by

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the house, must be taken as a fact established by the house journal, plaintiffs' subtle argument to the contrary notwithstanding. But plaintiffs' main contention is that this fact does not "*incorporate*" the amendments in the proposed law, because the bill was not *passed* by the house.

Their argument, substantially in their own language, runs thus: "The philosophy of the agreement to the committee amendments is, that if (as) the committee has amended the bill, the house chooses to proceed to the consideration of the measure as amended rather than to debate the bill as originally proposed * * *. 'Incorporate' means 'to place in a body; to embody.' (Cent. Dic.) The house never having passed the bill itself, it (the house) cannot be said to have embodied the amendments in the bill." The gist of this bit of ratiocination is this: I. The committee amended the bill, the house did not, therefore the house did not embody the amendments in the bill. II. The house amends a bill only by passing it. The house did not pass it, hence did not amend it.

Let us test these propositions. Are they true? The plaintiffs refer us to Robert's Rules as the parliamentary law of the assembly. One of them, rule 31, "Adoption of Reports," reads thus: "When the Assembly is to consider a report, * * * a motion should be made to 'adopt,' 'accept,' or 'agree to' the report, all of which, when carried, * * * make the doings of the committee become the acts of the assembly, the same as if done by the assembly without the intervention of a committee." Then the amend-

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ments reported by the committee, having been adopted by the committee, became adopted by the assembly when the assembly "agreed to" them. Therefore proposition I is not true, unless "to embody" amendments in a bill means something else than adopting amendments to the bill—which is absurd.

In support of proposition II the plaintiffs cite house rule 67: "When a bill has passed the house, the clerk shall read its title, substituting the word 'act' for the word 'bill.'" Upon this rule they make this comment: "When the bill has passed, it is an *act* and not before." Certainly, a bill passed to an act is a bill passed. But this does not prove that a bill may not be amended *before* it is passed. Hence their conclusion that this bill was not amended because it was not passed, is also without logical sequence.

Counsel for plaintiffs further say: "The phraseology 'the amendments were agreed to' was not intended by the house to be an incorporation of the committee amendments in the bill in any 'final sense.'" This court can not find upon the record that the legislature's last action on the bill, adopting these amendments, was attended with a mental reservation that they were not adopted in a "final sense." The house has left no hint that it contemplated further action. But if so, the Constitution, fourth clause of Section 1b, does not require the amendments to be incorporated *finally* in the bill. This would be contrary to the reason as well as to the text of this revision. The purpose plainly is that proposed amendments may be submitted to the people, whether they

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are adopted in the proposed law finally or only provisionally, in order to have them discussed and to take the sense of the house upon them. The plain language is that the initiated law may be submitted to the people with or without changes proposed by the legislature. The Ohio plan of the initiative is, first to submit the proposal to the body especially delegated to make laws, in order to have the benefit of its knowledge, experience and discussion before the proposal is directly passed upon by the people. There seems to be no reason why the changes proposed by the legislature should be excluded from the submission because the bill was not passed by the house with the modifications which it wrote into them; on the contrary, there are plausible, good reasons why proposals made by the legislative department of government should be submitted to the people along with the proposals made by the petitioners.

Now observe the text, clause 4: "The proposed law shall be submitted in the form demanded

* * * which form shall be either as first petitioned for or with any amendment or amendments * * * incorporated therein by either branch or by both branches of the general assembly." Clause 3: "If it shall not be passed, or if it shall be passed in an amended form, or if no action shall be taken *thereon* * * * it shall be submitted," etc.

Does "*thereon*" refer to the original and not to the amended form? If it refers to the amended form, and if no action be taken on the amended form (which is precisely the case at bar), then

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that form may be submitted. But plaintiffs say it cannot be submitted, just *because* no action was taken on it. They contradict the document itself.

The plaintiffs' last proposition in argument is that "the amendment [to the constitution] demonstrates * * * that much more was intended than a mere suggestion or tentative adoption of change in the form of the originally initiated law." That is the very conclusion to which they should have brought the mind of the court. We have considered the reasons which they have given in their brief to bring us to that conclusion, and we have found them invalid or insufficient.

The decision hangs upon the construction of a power. The power is defined in Section 1 of Article II, thus: "The legislative power of the state shall be vested in a general assembly * * * but the people reserve to themselves the power to propose to the general assembly laws * * * and to adopt or reject the same at the polls." The first named is a delegated power—from the people to their legislative agents or representatives. The second is a reserved power; it comprehends all of the sovereign power of legislation not thus delegated. Instinctively the legal mind affirms that the delegated power is to be strictly construed with reference to the purpose for which it is granted. But on the contrary the reserved original power is not to be restricted by any limitations, except such as are imbedded in the federal constitution. This would be a preposterous assumption on the part of this court,

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exercising judicial authority conferred by the same sovereign. We cannot restrain an agent of the executive department from the exercise of functions within the general scope of the authority conferred by the people on that department of government, unless the act is clearly forbidden by the organic law of the state, especially where the act is merely preparatory to the direct exercise of the sovereign power of the people to legislate for themselves. It is our duty to interpret the language of the constitution according to its fair and reasonable import and the common understanding of the people who framed and adopted it. The clause in question, read in connection with the context, by fair and reasonable construction, does not convey the meaning which the plaintiffs seek to give it by a rigid construction. Therefore their contention can not be sustained.

There is another indisputable and imperative reason why the remedy they invoke must be denied. We can not intervene in the process of legislation and enjoin the proceedings of the legislative department of the state. That department is free to act upon its own judgment of its constitutional powers. We have not even advisory jurisdiction to render opinions upon mooted questions about constitutional limitations of the legislative function, and we will not presume to control the exercise of that function of government by the general assembly, much less by the people, in whom all the power abides. The legislature, having delegated authority, prescribed and limited by the constitution, may exceed its authority by promulgating a law in conflict with the constitu-

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tion. In a clear case of the latter sort, where the void law is about to be enforced against a citizen to his prejudice, we may enjoin execution of the law, for the protection of the rights of person or property guaranteed by the constitution. This is not such a case; no private rights of person or property are in jeopardy, and there is no law or semblance thereof complained of. We are simply asked to regulate the affairs of another branch of government, in deference to the general welfare, in a matter quite outside and independent of our authority. We are asked to prevent the people from exercising the initiative, upon a quizzical interpretation of a single word in their own letter of authority to their secretary of state. We can not enjoin the sovereign state of Ohio where the people have not in their constitution, clearly beyond reasonable doubt, limited the exercise of their power to legislate directly by the initiative. Therefore the writ must be refused.

Judgment of the lower court affirmed.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE,
WANAMAKER and NEWMAN, JJ., concur.

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THOMAS, JR., v. THE BOARD OF COUNTY COMMISSIONERS OF HAMILTON COUNTY.

Assistant city solicitor—Designated as prosecuting attorney of police court—Under Section 1536-663, Revised Statutes—Entitled to compensation from county, when.

An assistant city solicitor who was designated by the city solicitor to act as prosecuting attorney of the police court under the authority conferred by Section 1536-663, Revised Statutes, then in force, and who pursuant to such designation performed the duties of the position referred to, was entitled to receive the compensation allowed by law for such services.

(No. 13550—Decided October 14, 1913.)

Error to the Circuit Court of Hamilton county.

Facts stated in the opinion.

Messrs. Robertson & Buchwalter, for plaintiff in error.

Mr. Thomas L. Pogue, prosecuting attorney, and *Mr. John V. Campbell* and *Mr. Charles A. Groom*, assistant prosecuting attorneys, for defendant in error.

JOHNSON, J. Plaintiff in error was duly appointed by the solicitor of the city of Cincinnati as one of the assistant city solicitors and was designated by the solicitor to act as prosecuting attorney of the police court of the city. He assumed his office on January 1, 1908, and performed its duties during 1908 and 1909. It is shown by an agreed statement of facts in the case

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that he received the salary fixed by the city and that the county commissioners in their semi-annual appropriation passed resolutions appropriating \$400 for the police prosecutor, without designating the name of the person to whom such money was to be paid.

The agreed statement further shows that during 1908 and 1909 warrants for said money were issued by the county auditor. The warrant for the first quarter of 1908, amounting to \$200, was issued to the plaintiff in error and the money paid from the treasury of the county to him. Thereafter all warrants were issued to and cashed by the city solicitor of the city under whom the plaintiff in error was acting. The plaintiff in error claims that the compensation should have been paid to him, and he now claims the monthly installments for the balance of the year 1908 and for the whole of the year 1909. Plaintiff in error presented this claim to the county commissioners, which was disallowed, and the court of common pleas and circuit court sustained this position of the commissioners. This proceeding is brought to reverse the judgments below.

Pertinent parts of Section 1536-663, Revised Statutes, which was in effect at the time of the appointment, are as follows: "The solicitor shall also be prosecuting attorney of the police court, and shall receive for this service such compensation as council may prescribe, and such additional compensation as the county commissioners shall allow; provided, that where council allows an assistant or assistants to the solicitor, said solicitor may designate an assistant or assistants to act as

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prosecuting attorney or attorneys of the police court. The duties of the solicitor as prosecuting attorney of the police court shall be such as are provided in Section 1813 of the Revised Statutes; such as are provided in this act, and in all other acts or parts of acts applying to all cities of the state and not inconsistent herewith. In case of the inability or absence of the solicitor or any of his assistants to act as prosecuting attorney of the police court, the provisions of Section 1815 of the Revised Statutes shall apply."

Section 1536-844, which is the same as Section 1813, provides that the prosecuting attorney of the police court shall prosecute all cases brought before that court and perform the same duties, as far as applicable, as the prosecuting attorney of the county, and further provides for his compensation from the city and the commissioners.

Section 1815, Revised Statutes, which is the same as Section 1536-846, Revised Statutes, provides for the appointment by the police judge of a prosecuting attorney for the police court in case of a temporary inability or absence of such prosecuting attorney, or of a vacancy in the office.

Under the code of 1869 the offices of solicitor and prosecuting attorney of the police court in cities of the first class were distinct from each other and were elective. This continued until March, 1891, when an act was passed providing for the appointment of a prosecuting attorney of the police court by the mayor with the advice and consent of the board of legislation.

The cases of *The State, ex rel., v. Jones*, 66 Ohio St., 453, and *The State, ex rel., v. Beacom*,

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66 Ohio St., 491, having declared invalid the classification by the legislature of municipalities beyond the classes authorized by the constitution, the municipal code of October 22, 1902, was enacted. The repealing clause of this act does not specify Section 1536-844 or Section 1536-846, being the sections referred to in the body of Section 1536-663. They are, therefore, still effective, and in so far as they may affect any of the provisions of Section 1536-663 must be considered in its construction. However, Sections 1536-844 and 1536-846 were manifestly passed in contemplation of the fact that in certain cities to which they applied the office of prosecuting attorney of the police court was separate and distinct from that of city solicitor. The municipal code of October, 1902, whose paramount purpose was the abolishing of classification of cities, such as had prevailed theretofore, did not provide for the office of prosecuting attorney of the police court as it had existed before, but provided for the designation by the city solicitor of an assistant or assistants for the performance of its duties. The solution of the question here, therefore, depends upon the construction of Section 1536-663, Revised Statutes. That section provides that the solicitor shall be prosecuting attorney of the police court and shall receive for this service such compensation as council may prescribe and such additional compensation as the county commissioners shall allow; *provided* that where council allows an assistant or assistants to the city solicitor, said solicitor may designate an assistant or assistants to act as prosecuting attorney of the police court.

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Not much assistance can be had from discussion of the varying significance of a proviso in statutes. It is not to be interpreted in a purely technical sense, and generally its meaning must be gathered from the context of the statute in which it is found. The contention here is that as the statute enacts that the solicitor shall *be* prosecuting attorney, the status is not changed by the exercise of the authority conferred upon him in the proviso to designate an assistant to *act* as prosecuting attorney. Having in view the purpose of the legislation, the prior state of the law and the duties of the office, we think it is apparent that this statute was passed for the purpose of providing for the selection of the official named, and that when the city solicitor designated one of his assistants to act as prosecuting attorney, he clothed the designated person with all of the attributes of the office. Otherwise the proviso would have been wholly useless. The very purpose of having assistants to the solicitor, or any other public officer, is to secure the participation by them in the performance of the duties of the office. Without this proviso the city solicitor could, at any time, have assigned the performance of the duties of prosecuting attorney of the police court to some of his assistants. He could have called one of them to his aid in the performance of those duties as occasion might require, in the same manner that he allots the trial of civil suits in which the city is a party, to his different assistants. It is well known that in many instances such assistants have full control of matters of great importance in the courts and elsewhere. They receive their author-

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ity to perform their duties solely because they are assistants and have been given the work to do by the city solicitor.

This proviso, we think, was intended to enable the solicitor to wholly separate himself from the duties of the office of prosecuting attorney of the police court, and in effect to make an appointment to that position.

It is urged that as the sole provision for compensation is found in the section referred to, which provides that the solicitor shall be prosecuting attorney "and shall receive for this service such compensation," therefore the solicitor himself is the one to whom the compensation is given. But in the view we have taken the section gives him authority to appoint an assistant to "perform this service" and relieve himself from it. Manifestly the legislature intended that the one performing this service should receive the compensation. The language of the statute is "shall receive for this service such compensation."

In the recent codification of the statutes the sections under investigation here are included in Sections 4306 and 4307, General Code. In Section 4306 it is provided that the solicitor may designate an assistant to perform such services, and in Section 4307 it is provided that the persons thus appointed shall be subject to approval of council and such assistants shall receive for their services in city cases such salaries as the council may prescribe, and the county commissioners may allow such further compensation as they deem proper.

Whatever consideration may be given to a general codification in the ascertainment of legislative

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intent may be properly invoked here, although it must be conceded that in this instance the language employed in the codification is more explicit than in the original act.

For the reasons given the judgments of the circuit court and common pleas will be reversed and the cause remanded to the court of common pleas with instructions to enter judgment for plaintiff in error.

Judgments reversed.

DONAHUE, WANAMAKER and NEWMAN, JJ.,
concur. NICHOLS, C. J., not participating.

PERKINS v. THE BOARD OF COUNTY COMMISSIONERS OF PUTNAM COUNTY.

Motions by both plaintiff and defendant for directed verdict—Subsequent motion to submit case to jury—Case to be submitted to jury, when.

(No. 13308—Decided October 14, 1913.)

ERROR to the Circuit Court of Putnam county.

Messrs. Bailey & Leasure, for plaintiff in error.

Mr. J. W. Smith, for defendant in error.

BY THE COURT. Plaintiff brought an action in the common pleas court of Putnam county against defendant for damages on account of injuries claimed to have been sustained through the negli-

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gence and carelessness of defendant. To the petition was filed an answer consisting of a general denial and the defense of contributory negligence. The charge of contributory negligence was denied by reply.

The case went to trial to a jury, and, at the close of all the evidence, defendant moved the court to instruct the jury to return a verdict in its favor, and, thereupon, plaintiff moved for a directed verdict in his favor. These two motions were presented to the court and the motion of defendant was overruled. Thereupon, a request was made by defendant that the case be submitted to the jury for its determination on the evidence, which request was refused. The court then sustained the motion of plaintiff for a directed verdict in his favor, and the jury found for him in an amount directed by the court. Upon the overruling of the motion for a new trial by defendant, judgment was rendered in favor of plaintiff in the amount found by the jury in the directed verdict.

Error was prosecuted to the circuit court by the defendant in error herein, and that court reversed the judgment of the court of common pleas upon the sole ground that the court had erred in refusing the request of the defendant below to submit the cause to the jury on the evidence after its motion to direct a verdict at the close of all the evidence had been overruled, the circuit court finding no further error in the record.

Plaintiff in error is seeking a reversal of the judgment of the circuit court, and we shall refer briefly to the cases cited in support of his contention.

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In the case of *Strangward v. American Brass Bedstead Co.*, 82 Ohio St., 121, a motion was made by each party after the impaneling of the jury for a verdict on the pleadings. The court held that such motion by each party was a waiver of a jury trial and a submission of the case to the court, and that a party could not, as of right, after his motion had been overruled and that of the other party sustained, give evidence in support of his case. The court say that the offer to give evidence came too late, the cause having already been submitted to the court and the court having rendered its judgment on the motion.

In the case before us, the motions were not made until the close of all the evidence, and the request of defendant that the case be submitted to the jury was made before judgment was rendered.

In *First Natl. Bank v. Hayes & Sons*, 64 Ohio St., 100, it is held that where at the conclusion of the evidence in the case each party requests the court to instruct the jury to render a verdict in his favor, the parties thereby clothe the court with the functions of a jury, and where the party whose request is denied, does not thereupon request to go to the jury upon the facts, the verdict so rendered should not be set aside by a reviewing court, unless clearly against the weight of the evidence.

It will be observed in that case that the party whose motion for a directed verdict was denied did not request the court to submit the case to the jury for its determination upon the evidence. Had such a request been made, it is obvious from the opinion of the court that a different conclusion would have been reached, for the court say that

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the omission of the plaintiff to ask the court to submit the case to the jury, after it had directed a verdict for defendant, must be taken as a waiver of its right to pass upon the evidence. The court further say that where, at the close of the evidence, each party moves the court for the direction of a verdict in his favor, each party must have intended to submit the case to the court for its finding upon the facts as well as the law.

In *Koehler v. Adler*, 78 N. Y., 287, followed and approved by later New York cases, it is held that when both parties ask for a directed verdict in their favor, respectively, it will be assumed that they intend to waive the right to a submission to the jury and consent that the court shall decide the questions of law and fact involved; but the court say that this presumption is repelled when the party whose request is denied thereupon asks to go to the jury upon the questions of fact.

This is the holding of practically all the cases on the subject. Applying it to the case under consideration, it follows that defendant below was entitled to a submission of his case to the jury on the facts, and the trial court, having denied it this right, committed prejudicial error.

The judgment of the circuit court in reversing that of the common pleas court is affirmed.

Judgment of circuit court affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, NEWMAN
and WILKIN, JJ., concur.

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MILLER v. THE LAKE SHORE & MICHIGAN
SOUTHERN RAILWAY COMPANY ET AL.

Acceptance of deed and entering into possession—Binds grantee, when—If grantee accepts benefits, he cannot reject burdens.

(No. 13353—Decided October 14, 1913.)

ERROR to the Circuit Court of Lorain county.

Mr. John J. Sullivan and Messrs. D. J. & D. F. Nye, for plaintiff in error.

Mr. H. C. Johnson and Mr. S. H. West, for defendant in error.

BY THE COURT. In this case the circuit court found the following facts:

"First: The defendant, The Lake Shore & Michigan Southern Railway Company, was before the commencement of this action, organized by the consolidation of The Junction Railroad Company, and other railroad companies, and at the time of the commencement of this action, was existing under and by virtue of the laws of the state of Ohio, and owned and operated a railroad extending from Cleveland, Ohio, to Chicago, Illinois, which railroad passes through the village and township of Amherst, Lorain county, Ohio, and said defendant company has owned and operated said railroad continuously for more than thirty years last past.

"Second: That said Junction Railroad Company was incorporated under an act entitled, 'An act to incorporate the Junction Railroad Company'

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enacted by the general assembly of the state of Ohio, on the 2nd day of March, A. D. 1846; that the 7th section of said act, provides as follows:

“Sec. 7. That the directors shall have power to determine the number and kind of tracks, turn-outs, branches, carriages, conveyances, storehouses, depots and other fixtures and machinery, prescribe the mode of transportation, and have power to construct a single or double track railroad.”

“That there was no other provision in said act or any of the amendments thereto providing for the number of tracks that said railroad company might construct.

“Third: The plaintiff, during the years 1867, 1872 and 1873, acquired title to a farm consisting of about one hundred and twelve (112) acres of land situated in the township of Amherst, county of Lorain, and state of Ohio, and ever since said dates has been, and still is, the owner of said farm.

“Fourth: The said Junction Railroad Company, the predecessor of the defendant, The Lake Shore & Michigan Southern Railway Company, prior to 1867 procured from Frederick Onstine and Daniel Onstine the right to use for railroad purposes a right of way not to exceed one hundred (100) feet in width, over and across the land which was owned by the plaintiff, Joseph R. Miller, at the time of the commencement of this action, and prior to the year 1869 said railroad company had constructed a single main track over and along said right of way.

“Fifth: The defendant, The Lake Shore & Michigan Southern Railway Company, after the year 1869 and prior to the 3rd day of May, 1889,

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constructed one additional main track and one side track over and along its right of way over the plaintiff's said land, so that on the 3rd day of May, 1889, said defendant railway company had two main tracks and one or more side tracks over and along its right of way across said plaintiff's said land, which said tracks extended in an easterly and westerly direction.

"Sixth: The highway leading past said plaintiff's said farm extended along the south side thereof about thirty (30) rods southerly and nearly parallel to the right of way of the defendant, The Lake Shore & Michigan Southern Railway Company, aforesaid, and the plaintiff's residence was, on the 3rd day of May, 1889, and still is situated on the north side of the said right of way of the defendant company and about thirty (30) feet north of the north line of said right of way; that at said last-named date and continuously thereafter until the present time, the said plaintiff's natural and most convenient means of access to his residence and farm buildings (which farm buildings were on the north side of said railroad track) was by a private way across his land and across the defendant's right of way and railroad tracks.

"Seventh: On the said 3rd day of May, 1889, the defendant railway company was desirous of purchasing from the plaintiff, a strip of land on the south side of its right of way for the purpose of constructing thereon other side tracks and at that time there was a proceeding pending in the probate court of Lorain county, Ohio, wherein the defendant herein, The Lake Shore & Michigan

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Southern Railway Company, was plaintiff, and the plaintiff herein, Joseph R. Miller, was defendant, whereby the said defendant railway company sought to appropriate said strip of land. That for the purpose of settling said case and to induce the plaintiff herein, Joseph R. Miller, to convey said strip of land to said defendant, The Lake Shore & Michigan Southern Railway Company, the said railway company promised and agreed, among other things, that it would construct no more tracks on the north side of its main track as it then existed so long as said house was occupied as a dwelling house; and thereupon said entire agreement was put in writing and embodied in a deed given by said plaintiff herein to said defendant, The Lake Shore & Michigan Southern Railway Company, which said contract and deed is in words and figures following, to-wit: .

“This indenture, made the 3rd day of May, in the year of our Lord, one thousand eight hundred and eighty-nine, between Joseph R. Miller and Helen A. Miller, his wife, of the township of Amherst, in the county of Lorain and state of Ohio, the grantors, and The Lake Shore & Michigan Southern Railway Company, the grantee,

“Witnesseth: That the said grantor, for and in consideration of the sum of one thousand (\$1,000.00) dollars, lawful money, to him in hand paid by the said grantee at or before the ensembling and delivery of these presents, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, released and confirmed, and by these presents does grant, bargain, sell, release and confirm unto the said grantee, and to its

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successors and assigns forever: All that certain piece or parcel of land, situate in the township of Amherst, county of Lorain, and state of Ohio and bounded and described as follows, to-wit:

“ ‘Being part of lots 98 and 3, in Amherst township, Lorain county, Ohio, and beginning in the south line of right of way of The Lake Shore & Michigan Southern Railway and in the west line of lands of Joseph R. Miller; thence southerly along said west line to a point 30 feet southerly from said right of way line, measured at right angles thereto; thence easterly 485 6-10 feet to a point 15 feet southerly from said right of way line measured at right angles thereto; thence easterly 200 5-10 feet to said south line of right of way; thence westerly along said south line of right of way 676 6-10 feet to the place of beginning, and containing 283-1000 of an acre more or less.

“ ‘It is also stipulated and agreed between the parties hereto as a part of the consideration for this conveyance:

“ ‘1st. That the grade at the top of the rail at Miller’s farm crossing when the improvement is completed shall not be lowered more than four (4) feet.

“ ‘2nd. That there shall be no tracks north of the present tracks in front of Miller’s house while said house is occupied as a dwelling except as may be necessary in the work of excavation for the change of grade.

“ ‘3rd. That when the work is finished the quarry switch tracks shall not connect with the main track east of the corporation line, and the

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present quarry track on the south side shall be taken out and connected west of the corporation line.

“ ‘4th. That said company shall construct a good farm crossing for temporary use at some suitable place on Miller’s land east of the present one and before disturbing Miller’s present crossing, and said Miller shall consent and does hereby consent to the vacation of his present crossing for a period not exceeding one year after the present crossing is taken up. And said Miller agrees during this time to use the crossing provided for temporary use. When the change of grade is finished and within one year from the removal of his present crossing said company shall immediately construct and maintain a good farm crossing at the site of the present one, or at a place within one hundred (100) feet east thereof as said Miller may direct, with approaches of one foot rise to fifteen feet horizontal upon its right of way, and if necessary to make the approaches of the grade mentioned it may cut upon the land of Miller.

“ ‘5th. That the company will so make its excavation for change of grade that the land of Miller will not be damaged by sloughing off.

“ ‘6th. That the sod on the right of way between Miller’s house and the tracks shall not be removed by said company except as much as may be necessary in excavating for the change of grade, and after the improvement is completed said company shall restore the cut to a uniform slope and leave the banks in as good condition as may be considering the nature of the work done.

“ ‘The land hereby conveyed is showed by lines marked A, B, C and D on plat hereto attached and

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made a part hereof, but subject to all legal highways.

“Together with all and singular the testaments, hereditaments and appurtenances thereunto belonging, or in anywise appertaining; and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and all the estate, right, title and interest whatsoever of the said grantor, either in law or equity, of, in or to the above bargained premises.

“To have and to hold the said premises above described, with the appurtenances, unto the said grantee, and to its successors and assigns forever.

“And the said grantor, for his heirs, executors, and administrators, does covenant and agree to and with the said grantee, its successors and assigns, that at and until the ensealing and delivery of these presents he is well seized of the premises above conveyed as a good and indefeasible estate in fee simple, and has good right to bargain and sell the same in the manner and form as above written, and that the same are free from all incumbrances whatsoever.

“And, furthermore, I, the said grantor, do by these presents bind myself and my heirs forever to warrant and defend the above granted and bargained premises, to it, the said grantee, its successors and assigns, against all lawful claims and demands whatsoever.

“And I, the said Helen A. Miller, do hereby remise, release, and forever quit-claim unto the said grantee, its successors and assigns, all my right and title of dower in the above described premises.

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" 'In witness whereof, the said grantors have hereunto set their hands and seals the day and year first above written.

" 'JOSEPH R. MILLER,

" 'HELEN A. MILLER.

" 'Signed, sealed and delivered
in presence of

" 'J. B. MILLER.

" 'H. G. REDINGTON.

" 'State of Ohio, }
" 'County of Lorain, } ss.

" 'On the 4th day of May, A. D. 1889, before me, a notary public in and for said county, came the above named Joseph R. Miller and Helen A. Miller, and acknowledged the above indenture to be their free act and deed, and desired that it might be so recorded.

" 'Witness my hand and seal the day and year above written.

" 'H. G. REDINGTON,
Notary Public.'

" '(Seal)

"Eighth: The defendant, The Lake Shore & Michigan Southern Railway Company, accepted said deed, caused the same to be recorded in the records of deeds of Lorain county, Ohio (Vol. 63, page 460), immediately took possession of said land, constructed said tracks thereon, and has continued to use and occupy said land from the said 3rd day of May, 1889, until the present time and is still occupying the same.

"That said railway company cut down its grade in front of said Miller's house, caused said Miller

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to use a crossing about thirty (30) rods east of his former crossing for nearly one year.

"That said plaintiff Miller has fully performed all the conditions required of him to be performed by the terms of said contract set forth in said deed and still occupies said house as a dwelling for himself and family.

"Ninth: The defendant, The Lake Shore & Michigan Southern Railway Company, has continuously from the said 3rd day of May, 1889, up to a time just prior to the commencement of this action, recognized said contract as set forth in said deed and respected the rights of said plaintiff thereunder.

"Tenth: The defendant, The Lake Shore & Michigan Southern Railway Company, just prior to the commencement of this action, constructed two tracks, on the north side of its north main track east of said plaintiff's residence and threatened to construct one or more tracks on the north side of the north main track as located on the 3rd day of May, 1889, between said north track and the plaintiff's said residence; and upon the trial of this case the defendant admitted that unless restrained by an order of the court it intended and still intends to construct said track between said north main track and said plaintiff's residence.

"That said defendant claims the right to construct other tracks between its said main track and plaintiff's house notwithstanding the contract entered into between it and said plaintiff on the 3rd day of May, 1889, which contract is embodied in said deed.

"Eleventh: The defendant, The Lake Shore & Michigan Southern Railway Company, con-

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templates using the tracks so to be constructed on the north side of the main track as located on May 3rd, 1889, as part of a four-track railroad along and through said township and county.

"Twelfth: There are located on the south side of the defendant's railroad, stone quarries from which are taken large quantities of sand stone which are shipped by car loads over said defendant's railroad; that the defendant railway company deems it expedient and necessary to have the cars so loaded with stone to be shipped east on the south side of said railroad and to have the cars to be shipped westerly, on the north side of said railroad so that they may be picked up by passing trains. That formerly the east-bound trains on said railroad were run on the north main track of said railroad, and the west-bound trains were run on the south main track of said railroad, but within the last two years said defendant company in order to conform to the general railway practice in the United States, has changed its direction of current of traffic so that the east-bound trains now run on the south main track and the west-bound trains run on the north main track, so that it has seemed expedient and necessary in the opinion of the defendant railway company to put sidings for cars going westerly on the north side of its main track between the present north main track of the defendant company and said Miller's residence.

"Thirteenth: On the north side of the main tracks of The Lake Shore & Michigan Southern Railway Company, west of the residence of the plaintiff, there is land both on said defendant

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railway company's right of way and north of its right of way to construct other tracks which could be used for railroad purposes.

"Fourteenth: There is land on the south side of the present right of way of the said defendant railway company both east, west and opposite to said plaintiff's residence upon which tracks for the use of the railroad company could be constructed; but in order to connect with tracks already constructed and in use north of the north main track, and easterly of plaintiff's said residence, the construction herein sought to be enjoined is necessary.

"Fifteenth: The north main track of the defendant company, as located on May 3, 1889, is and was sixty-six (66) feet south of the south line of the plaintiff's residence; that the usual distance from the center of one track to the center of another track is thirteen (13) feet and that for every additional track placed on the north side of the north rail of the defendant's main track, as located on the 3rd day of May, 1889, will bring the north line of said additional track thirteen (13) feet nearer said plaintiff's residence.

"Sixteenth: The north line of the right of way of the defendant company was, on the 3rd day of May, 1889, and ever since that time has been and is now seventeen and one-half ($17\frac{1}{2}$) feet south of the south line of the plaintiff's dwelling house."

By the acceptance of this deed described in this finding of facts and the entering into the possession of the premises conveyed thereby, the grantee, The Lake Shore & Michigan Southern Railway

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Company, bound itself to the performance of each and every condition written therein, and it cannot now be permitted to retain the benefits thereof and reject the burdens imposed by these conditions.

If the present needs of the railroad company require the doing of the things sought to be enjoined in this action, it cannot be permitted to do so in defiance of its positive contract. In other words, it will not be permitted to accept and retain the benefits conveyed by this deed and reject its burdens.

Therefore, the judgment of the circuit court is reversed and a perpetual injunction is allowed as prayed for in the amended petition until The Lake Shore & Michigan Southern Railway Company obtains the right by appropriation or otherwise to do and perform the things herein enjoined.

Judgment reversed and judgment for plaintiff in error.

JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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HAHN v. McBRIDE ET AL., PARTNERS, ETC.

Nonresident attorney should not rely upon notification by opposite counsel or clerk of court—Of date set for trial.

(No. 13563—Decided October 14, 1913.)

ERROR to the Circuit Court of Richland county.

Mr. William B. Woods, for plaintiff in error.

Mr. N. M. Wolfe, for defendants in error.

BY THE COURT. This proceeding in error is prosecuted to reverse the judgment of the circuit court affirming the judgment of the common pleas court in overruling the motion of plaintiff in error to vacate judgment of dismissal theretofore entered in said cause.

It appears from the record that this cause was regularly set for trial June 6, 1911; that on said day the plaintiff did not appear, and on the next day, June 7, the court dismissed the action for want of prosecution at costs of plaintiff. Later a motion was filed to vacate this judgment of dismissal for the reason that counsel for plaintiff in error was not advised that the cause had been assigned for trial on June 6, 1911. It appears that counsel for plaintiff in error was a nonresident of Richland county and depended entirely upon the clerk of the courts to notify him when the cause would be assigned for trial, but it does not appear that he had made any arrangement with the clerk to that effect.

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It further appears from the record that a former judgment in this case in favor of plaintiff in error had been reversed by the circuit court and remanded to the common pleas court for a new trial. One of the reasons assigned by the circuit court for the reversal of this judgment was that "the court of common pleas erred in overruling the demurrer of defendants below." No error was prosecuted to this judgment of reversal, and, therefore, the judgment of the circuit court in that behalf was final. That judgment was entered on the 25th of January, 1911. No effort was made by the plaintiff to amend this petition until June 7, 1911, after the cause had been dismissed for want of prosecution, when an amended petition was sent through the mails to counsel for defendant, requesting his consent to file the same. There having been a final adjudication on January 25, 1911, that the petition of the plaintiff did not state a cause of action, it thereupon became the duty of the plaintiff to file an amended petition within a reasonable time thereafter, and his failure to do this for almost five months was sufficient to authorize the trial court to dismiss the action for want of prosecution without reference to failure of plaintiff to appear on the day the cause was regularly assigned for trial.

It does not appear that counsel for defendant was in any wise responsible for the fact that nonresident counsel was not informed of the date fixed for the trial of this cause. Clearly counsel for plaintiff in error does not show that he exercised any diligence whatever to ascertain that fact, nor did he make any arrangements

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with any one to advise him when this cause would be assigned for trial. Although he resided in another county, and was, therefore, not in position to know what was being done in the Richland county courts, it seems that he relied entirely upon the kindness of the clerk and the courtesy of opposing counsel to take care of his cause for him. During all this time he permitted this cause to encumber the docket of the Richland county court without making any effort whatever to file an amended petition or bring it to trial. He can not now be heard to complain that the court relieved its docket of a cause in which by the judgment of the circuit court the defendant was entitled to judgment upon the pleadings any day that he might request it. Upon the motion to vacate this judgment he does not offer to the court any amended petition showing that he has a cause of action against the defendant.

The judgment of the common pleas court dismissing this cause was not an abuse of discretion and the circuit court did not err in affirming that judgment.

Judgment affirmed.

NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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FORSYTHE v. THE NORFOLK & WESTERN
RAILWAY COMPANY.

Sufficiency of averments of petition—To rescind contract—No averments of fraud or mistake—Mere claim of insufficiency of consideration—Petition demurrable.

(No. 13577—Decided October 14, 1913.)

ERROR to the Circuit Court of Scioto county.

Messrs. Evans & Crawford, for plaintiff in error.

Mr. Oscar W. Newman, for defendant in error.

BY THE COURT. The only question presented by the record in this cause is the question as to the sufficiency of the petition. A general demurrer was sustained by the common pleas court to this petition and on appeal to the circuit court that court also entered a like judgment.

The plaintiff seeks in his petition to rescind a contract entered into between himself and the defendant railroad company on the 29th day of March, 1904. The petition contains no averments whatever of fraud or mistake in the execution of the contract, nor is there any averment that there was no consideration or a failure of consideration. The only reason given why the relief sought should be granted is that the consideration was not sufficient. The petition, among other things, recites the fact that in 1907 an action was commenced by plaintiff upon this contract to

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recover damages caused by the reconstruction of the right of way of the defendant company and a judgment for \$250 was recovered, which judgment was paid by the defendant; that again in 1910 he brought a subsequent and second action for the same reasons contained in the first action, and in that case both the common pleas and circuit courts denied him relief. Afterwards, in the same year, he brought a third action predicated upon Section 8908, General Code, but the petition does not inform the court what has become of that action, but it does contain the averment that under the decision and judgment in the second case he will be barred from statutory remedy under Section 8908. Clearly this is no reason for the rescission of the contract, and it is equally clear that after two suits have been brought by the plaintiff upon this contract and recovery was had in one suit and recovery denied him in the second suit, it is too late for him to ask a rescission of the contract.

The judgment of the circuit court is affirmed.

Judgment affirmed.

SHAUCK, JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur. NICHOLS, C. J., and NEWMAN, J., not participating.

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THE OHIO & WESTERN PENNSYLVANIA DOCK
COMPANY v. TRAPNELL.

Newspaper account of facts of cause—Published during trial—Does not constitute reversible error—Unless proof establishes that jurors read account—Misconduct of counsel during trial.

(No. 13988—Decided October 14, 1913.)

ERROR to the Circuit Court of Cuyahoga county.

Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews, for plaintiff in error.

Messrs. Ewing, Counts & Terrell and Mr. Harry F. Payer, for defendant in error.

BY THE COURT. This was an action for damages for personal injury received by the defendant in error while in the employ of the plaintiff in error.

The plaintiff, after describing in his petition the nature of the work in which he was engaged, the machinery employed and the relative duties of certain employes associated with him in the work, averred that his injuries were caused by and through the negligence of the defendant in the following particulars:

"1. That said defendant disregarded its duty to use ordinary care and diligence to furnish safe and proper machinery and means for oiling said engines, but negligently provided only a most palpably unsafe, unsecure and dangerous means, as it well knew, of oiling said engines.

"2. That it negligently failed in its duty to plaintiff to use ordinary care and diligence to

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provide some means whereby each of said engines could be disconnected from its controlling levers while plaintiff was at work upon it.

"3. That it negligently failed to use ordinary care and diligence to provide some system of guarding against the starting of said engines by said operators or some other persons while plaintiff was at work upon them, or some system of warning that plaintiff was so at work.

"4. That it negligently failed to provide some means of direct communication between said plaintiff and the operators aforesaid.

"5. That it negligently failed to make and formulate and make known to plaintiff and the operators reasonable, necessary and sufficient rules and regulations providing for warning said plaintiff against the starting of said engines by its levers as aforesaid, nor any sufficient rules and regulations or supervision necessary for the government of its said employees and the operation of said machinery."

The injury complained of resulted in the loss of plaintiff's left hand and arm, and it further appears that prior to that time he had lost his right hand in a former accident.

The defendant answered admitting plaintiff's employment and injury, the nature of the work in which plaintiff was engaged and the character of the machinery employed in the performance of this work, but denied each and every other allegation in the petition contained, and further answering averred that whatever injuries plaintiff sustained were directly and proximately caused by plaintiff's own negligence in that he carelessly

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and recklessly placed his hand within the drum of said "rig" without exercising any ordinary and prudent care for his own safety. Said defendant further answering averred that if it was in any manner whatsoever negligent, which, however, it expressly denied, plaintiff's own negligence contributed to his injury; that he had full knowledge of the construction and operation of the machinery and was careless and reckless in its use.

The reply denied all allegations of negligence on the part of the plaintiff.

Upon the trial of the issue to the jury a verdict was returned for the plaintiff in the sum of \$20,700. Upon a motion for a new trial the court reduced this amount to \$15,000 and rendered judgment accordingly. This judgment of the trial court was affirmed by the circuit court.

There are many assignments of error, but the principal one urged upon the attention of this court is the misconduct of plaintiff's counsel. It appears from the record that on the evening of the day on which the trial was commenced the *Cleveland Press*, which was circulated and sold upon the streets of Cleveland after three o'clock P. M. of that day, contained the following article:

"HE LOSES ARMS, FIGHTS FOR PAY.

"INSURANCE COMPANY RELIEVES EMPLOYERS
OF VICTIM.

"Isaac Trapnell, 64, 7600 Lawn avenue, sat helpless in Judge Babcock's court Tuesday.

"Trapnell had worked for the Ohio and Western Pennsylvania Dock Company for thirty-eight

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years. He lost both hands while at work. He was in court in his suit against the company for \$50,000 damages.

"The company had no attorneys present, for Trapnell was insured in the Aetna Life Insurance Company, according to his attorney, Harry Payer. The dock company had paid so much a month for Trapnell's insurance. His fight is with the insurance people.

"In July, 1905, Trapnell's left arm was caught in the cogs of a hoisting engine. He was unable to work for more than a year. 'We'll give you \$500 and an easy life job' the company told Trapnell. Trapnell took the money and paid hospital expenses. He wanted a job as watchman, but the company put him to work on a hoisting engine. Again his arm was caught. He lost the lower part of his only arm.

"Pictures showing him with both arms and with the two pathetic stubs will be introduced as evidence. 'If there is any delay in justice in most personal injury cases it is because of companies that insure workmen,' Payer said. 'They fix a price on flesh and blood and make it a business to fight the injured through all the courts if necessary.'"

It further appears from the evidence that the reporter of this newspaper who wrote this article testified that this information was furnished him by one of the attorneys for defendant in error, and that it was furnished him for the purposes of publication about the time of the commencement of the trial. The evidence, however, fails to show that this article ever came to the attention of any

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member of the jury, but counsel for defendant relied upon the fact that people generally read the newspapers as sufficient for the court to take judicial knowledge of the fact that these particular jurors, or some of them, had read this particular article.

While this court agrees with counsel for plaintiff in error that this was misconduct on the part of counsel for the defendant in error, and that the same was reprehensible and wholly inexcusable, yet that fact does not necessarily make it prejudicial to defendant. Counsel in the trial of a case may be guilty of many acts of misconduct that would subject him to reprimand by the court, or even to punishment for contempt of court, and yet the act may not be prejudicial to the rights of either party to the cause; and in such case it would be highly improper to reverse for such reason. If the fact had been made to appear by the evidence that the jury, or any member thereof, had read this article before a final determination of this case, this court would be inclined to hold that in such a case it would become the duty of a trial court to withdraw a juror and continue the case, and for refusal so to do would promptly reverse the judgment. But a matter of this importance cannot be left to conjecture merely. The opportunity was afforded counsel for defendant in error to make that fact appear. They chose to rest their case upon the presumption of fact only, and, therefore, we do not think the court abused its discretion by refusal to withdraw a juror and continue the cause. Contemporaneously with the publication of this article in the *Cleveland*

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Press, an article also appeared in the *Cleveland News*, which it is also claimed was procured to be published in that paper by counsel for defendant in error. This article is less objectionable than the one above set forth. What we have said with reference to that applies equally to this publication.

It is also urged upon our attention that during the trial of the case one of the counsel for the plaintiff below was guilty of several acts of misconduct, which in connection with the misconduct hereinbefore stated was highly prejudicial to defendant and prevented a fair trial of the cause. This misconduct consisted of remarks by counsel for plaintiff calculated to prejudice the defendant with the jury. For instance, when an objection to his question was made by opposing counsel, and after the objection had been sustained by the court, the offending counsel would make remarks such as: "I supposed there would be objection to the truth anyhow. It could not be prejudicial," and "You are objecting because when you make up a bill of exceptions, if ever you have to, it would be much better probably for your side not to have a living representation," and other remarks of like character throughout the trial of the cause. Remarks of this kind are wholly improper in the trial of a case and it is the duty of the trial court to see that they are not made, or at least not persisted in, but something must be left to the discretion of a trial court, otherwise we would never reach an end to litigation, and a reviewing court ought not to reverse unless it clearly appears that such misconduct was of such

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character and so persistent as to prevent a fair trial of the cause. While this court will sustain a trial court in compelling counsel to properly conduct their cause and to refrain from all side remarks and unprofessional conduct either by directions to the jury to disregard these remarks and the punishment of counsel if they persist in offending, or by granting a new trial therefor, yet it will not reverse the judgment until it clearly appears that such conduct was prejudicial to the losing party.

It is contended in this case that the amount of the verdict returned by the jury is sufficient evidence of the fact that this misconduct of counsel inflamed and prejudiced the jury's mind against the defendant, but that contention cannot be sustained. It is true the verdict was very large, so large that the trial court thought it excessive in the sum of nearly six thousand dollars, but it is a hard matter for any man, or number of men, to properly estimate the value of the loss of the only arm a man has. The loss of the right arm of course increased the value of the left arm to the plaintiff. True, the defendant was not responsible for that loss, yet at the time this injury occurred to this plaintiff this left arm by reason of the fact that his right arm was gone was of far more value to him than a left arm would be to any man who is fortunate enough to still possess his right, and while perhaps the verdict was excessive in the amount found by the trial court, yet there is no rule or method by which that fact can be positively determined.

We are also of the opinion that the court did not abuse its discretion, that no improper evidence

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was admitted and that the court's charge fairly stated the law of this case, and, therefore, the judgment of the circuit court must be affirmed.

Judgment affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN. JJ., concur.

MEMORANDA

OF

CASES DECIDED AND REPORTED WITHOUT OPINION, DURING THE PERIOD EM- BRACED IN THIS VOLUME.

No. 13014. *SULLIVAN v. TELLING*. Decided March 4, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. White, Johnson & Cannon*, for plaintiff in error. *Mr. S. H. Tolles* and *Messrs. Smith, Taft & Arter*, for defendant in error. Judgment reversed and final judgment for plaintiff in error. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13017. *THE CLEVELAND TRUST CO. ET AL. v. THE MUTUAL BANK*. Decided March 4, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Blandin, Rice & Ginn*, for plaintiffs in error. *Messrs. Stearns, Chamberlain & Royon*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13018. *THE CINCINNATI TRACTION CO. v. FRITSCH, ADMR.* Decided March 4, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Kinkead & Rogers* for plaintiff in error. *Mr. Gideon C. Wilson* and *Messrs. Horstman &*

Cases Reported

Horstman, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13030. WOLF, ADMR., *v.* HOWARD ET AL. Decided March 4, 1913. ERROR to Circuit Court of Huron county. *Mr. Jesse Vickery*, for plaintiff in error. *Messrs. Young & Young; Mr. A. V. Andrews; Mr. W. R. Pruner and Mr. Jesse Vickery*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13623. THE LIMA LOCOMOTIVE & MACHINE Co. *v.* JOHNSTON. Decided March 4, 1913. ERROR to Circuit Court of Allen county. *Mr. Vernon H. Burke; Mr. William M. Byrnes and Messrs. Prophet & Eastman*, for plaintiff in error. *Messrs. Armstrong, Light & Shappell*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 12672. THE TAYLOR LAND & IMPROVEMENT Co. *v.* GLEICHMAN ET AL. Decided March 11, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. Addison C. Waid and Messrs. Ong, Thayer & Mansfield*, for plaintiff in error. *Mr. Joseph L. Stern*, for defendants in error. On rehearing. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 12889. *THE TOLEDO RAILWAYS & LIGHT Co. v. O'NEIL*. Decided March 11, 1913. ERROR to Circuit Court of Lucas county. *Messrs. Smith & Baker*, for plaintiff in error. *Messrs. Southard & Zabel*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13032. *COWDEN v. CHRISTY, ETC.* Decided March 11, 1913. ERROR to Circuit Court of Wayne county. *Messrs. Keifer & Keifer* and *Mr. A. D. Metz*, for plaintiff in error. *Mr. E. S. Wertz* and *Mr. John McSweeney*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13033. *LEEDLE v. CHRISTY, ETC.* Decided March 11, 1913. ERROR to Circuit Court of Wayne county. *Messrs. Keifer & Keifer* and *Mr. A. D. Metz*, for plaintiff in error. *Mr. E. S. Wertz* and *Mr. John McSweeney*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13038. *KISTLER v. THE LEATHERWOOD CONSOLIDATED COAL CO. ET AL.* Decided March 11, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Addison & Addison*, for plaintiff in error. *Mr. Ralph E. Westfall*; *Messrs. Rosemond & Bell* and *Mr. Harry W. Lloyd*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur.

Cases Reported

No. 13042. *PPAFFMAN v. GUNTHER*. Decided March 11, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. Richard H. Lee*, for plaintiff in error. *Messrs M. B. & H. H. Johnson* and *Mr. T. H. Hogsett*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN* and *WILKIN, JJ.*, concur.

No. 13056. *MCCARTNEY v. LEEDY*. Decided March 11, 1913. ERROR to Circuit Court of Trumbull county. *Mr. Homer E. Stewart* and *Mr. Wade R. Deemer*, for plaintiff in error. *Messrs. Hine, Kennedy & Manchester*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN* and *WILKIN, JJ.*, concur

No. 13487. *ERIE RAILROAD CO. v. MARULLO*. Decided March 11, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Cushing, Siddall & Palmer*, for plaintiff in error. *Mr. Harry F. Payer*, for defendant in error. Judgment affirmed. *JOHNSON, WANAMAKER* and *WILKIN, JJ.*, concur.

No. 13667. *APPLER, ADMX., v. THE PORTSMOUTH STREET RAILROAD & LIGHT CO.* Decided March 11, 1913. ERROR to Circuit Court of Scioto county. *Mr. Theodore K. Funk*, for plaintiff in error. *Messrs. Milner, Miller & Searl*, for defendant in error. Judgment affirmed. *JOHNSON, WANAMAKER* and *WILKIN, JJ.*, concur.

Without Opinion.

No. 13680. JENKINS, ADMR., *v.* THE PORTSMOUTH REFRACTORIES Co. Decided March 11, 1913. ERROR to Circuit Court of Lawrence county. *Mr. J. O. Yates* and *Mr. T. A. Jenkins*, for plaintiff in error. *Mr. A. R. Johnson*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 12900. STORM *v.* BRYSON. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. E. Jay Pinney* and *Mr. Herman J. Nord*, for plaintiff in error. *Messrs. Hoyt, Dustin, Kelley, McKechnan & Andrews*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 12967. THE PEOPLE'S RAILWAY Co. *v.* THE DAYTON STREET RAILWAY Co. Decided March 18, 1913. ERROR to Circuit Court of Montgomery county. *Messrs. McMahon & McMahon*, for plaintiff in error. *Messrs. Murphy, Eliff & Emanuel*, for defendant in error. Judgment reversed. Ground stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said court be, and the same hereby is, reversed; and this court finds, on the agreed statement of facts between the parties, that the said plaintiff in error is entitled to recover from defendant in error on account of the construction of the bridge referred to in said agreed statement of facts; and the court finds that the said plaintiff in error, having paid the

Cases Reported

sum of \$40,000 toward the construction of such bridge, and it not being shown in the record whether, and if so how much, depreciation occurred in said bridge, between its construction and the commencement of this proceeding in the courts below, it is ordered and adjudged that this cause be remanded to the court of common pleas, with instructions to proceed according to law and fix the value of said bridge at the beginning of this proceeding and to enter judgment in favor of plaintiff in error against the defendant in error for one-half of such sum as bears the same proportion to the value of said bridge at the beginning of this proceeding that \$40,000 bears to the original cost of said bridge, but said judgment for said one-half shall, in no event, exceed the sum of \$20,000, with interest from the date of the beginning of the suit, but the judgment shall include interest on such one-half from the date of the beginning of the suit. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

On December 19, 1913, the court made the following entry on its journal.—REPORTER.

This day this cause came on to be heard on the motion of the plaintiff in error to modify the judgment rendered by this court herein on March 18, 1913, and of the defendant in error to modify said judgment, for the reasons stated in said motions severally. The same were argued by counsel and submitted to the court. On consideration whereof, it is ordered and adjudged by this court that the motion of the plaintiff in error be, and the same

Without Opinion.

is hereby, sustained; and it is hereby ordered that the judgment heretofore rendered in this cause in this court be modified so as to read as follows: It is ordered and adjudged by this court that the judgment of the circuit court be, and the same is hereby, reversed for the reason that this court finds that upon the agreed statement of facts contained in the record plaintiff in error is entitled to recover from the defendant in error on account of the bridge referred to in said statement of facts. And coming now to render the judgment which said circuit court should have rendered, it is hereby ordered that the said cause be remanded to the court of common pleas with instructions to enter judgment in favor of the plaintiff in error against the defendant in error for one-half of the sum of \$40,000 paid by the plaintiff in error towards the construction of the bridge referred to in said agreed statement of facts, to-wit: \$20,000, in addition to the sum of \$5,034.55, the sum for which judgment was actually entered, thus making the amount of the judgment now to be entered by said court of common pleas in favor of the plaintiff in error against the defendant in error the sum of \$25,034.55 with interest from the date of the original judgment in probate court.

It is further ordered and adjudged that the motion of the defendant in error and its application for a rehearing be, and the same are hereby overruled.

It is further ordered and adjudged that the defendant in error pay the costs herein and in the courts below.

Cases Reported

On March 3, 1914, the court made the following entry on its journal.—REPORTER.

This cause came on to be heard on the motion of the defendant in error filed in this court January 10, 1914, to modify the judgment of the court rendered on December 19, 1913. On consideration whereof, it is ordered and adjudged that the sum deposited by the defendant in error with the probate judge of Montgomery county June 21, 1909, be paid to the plaintiff in error and credited on the judgment ordered to be rendered by this court.

And it is further ordered that no interest be calculated on the sum of \$5,034.55, part of the judgment heretofore ordered to be rendered in said cause, which sum of \$5,034.55 was paid into said court on June 21, 1909.

No. 13019. TOLEDO, ST. LOUIS & WESTERN RAILROAD CO. ET AL. *v.* PRICE, ADMR. Decided March 18, 1913. ERROR to Circuit Court of Putnam county. *Mr. Charles A. Schmettau; Messrs. Bailey & Leasure; Mr. John H. Clarke and Messrs. Watts & Moore*, for plaintiffs in error. *Mr. T. R. Hamilton; Mr. W. P. Anderson and Messrs. Handy & Unverferth*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13041. THE UNION SUPPLY CO. *v.* THE FIRESTONE TIRE & RUBBER CO. Decided March 18, 1913. ERROR to Circuit Court of Lucas county. *Messrs. Marshall & Fraser*, for plaintiff in error.

Without Opinion.

Messrs. Brown, Geddes, Schmiettau & Williams, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13061. MADIGAN, COUNTY TREASURER, *v.* THE CLEVELAND-CLIFFS IRON CO. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. John A. Cline* and *Mr. Cyrus Locher*, prosecuting attorneys; *Mr. Timothy S. Hogan*, attorney general; *Mr. Walter D. Meals*, assistant prosecuting attorney, and *Mr. N. E. Warwick*, for plaintiff in error. *Messrs. Hoyt, Dustin, Kelley, McKeegan & Andrews*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13068. KIBLER, GUARDIAN, *v.* HAND. Decided March 18, 1913. ERROR to Circuit Court of Licking county. *Messrs. Kibler & Kibler*, for plaintiff in error. *Messrs. Flory & Flory*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas court affirmed on authority of *Weaver v. Gregg*, 6 Ohio St., 547. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13070. MILLER *v.* FARLEY. Decided March 18, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Thompson & Bennett*, for

Cases Reported

plaintiff in error. *Mr. T. S. Hogan and Messrs. Belcher & Connor*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13702. CARTER ET AL. *v.* McGRATH ET AL.. Decided March 18, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Watson, Stouffer & Davis* and *Mr. W. J. Ford*, for plaintiffs in error. *Messrs. Wilson & Rector*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13089. SMITH *v.* GOWAN ET AL. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. M. G. Norton; Mr. E. J. Pinney* and *Mr. H. L. Peeke*, for plaintiff in error. *Messrs. Henderson, Quail & Siddall; Messrs. Kline, Tolles & Morley; Messrs. Hart, Montgomery & Smith* and *Messrs. Squire, Sanders & Dempsey*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13090. SMITH *v.* GOWAN ET AL. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. M. G. Norton; Mr. E. J. Pinney* and *Mr. H. L. Peeke*, for plaintiff in error. *Messrs. Hart, Montgomery & Smith; Messrs. Henderson, Quail & Siddall; Messrs. Squire, Sanders & Dempsey* and *Messrs. Kline, Tolles &*

Without Opinion.

Morley, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13523. COLEMAN ET AL., TRUSTEES, *v.* THE STATE, EX REL. MAHER, PROSECUTING ATTORNEY, ET AL. Decided March 18, 1913. ERROR to Circuit Court of Darke County. *Mr. Alva B. Campbell; Mr. William Harry Gilbert; Mr. J. M. Bickel and Mr. Martin B. Trainor*, for plaintiffs in error. *Mr. L. E. Kerlin*, prosecuting attorney; *Mr. John F. Maher; Mr. D. W. Bowman; Mr. L. H. Shipman and Mr. O. R. Krickenberger*, for defendants in error. Judgment affirmed for reasons stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is hereby affirmed; this court finding that the statute in question was valid and constitutional, but that the plaintiffs in error in this court are not entitled to the relief prayed for. It is further ordered and adjudged that the said plaintiffs in error pay the costs herein, and that this cause be remanded to the court of common pleas to carry this judgment into execution. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13569. STAHL, A MINOR, BY ETC. *v.* PENNSYLVANIA CO. Decided March 18, 1913. ERROR to Circuit Court of Mahoning county.

Cases Reported

Messrs. Anderson, Cook, Mathews & Cook, for plaintiff in error. *Messrs. Arrel, Wilson, Harrington & DeFord*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13699. DIKOB *v.* PREUSSER ET AL. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. M. P. Mooney*, for plaintiff in error. *Mr. Francis J. Wing* and *Mr. Herman Preusser*, for defendants in error. Judgment reversed and judgment for plaintiff in error. SHAUCK, C. J., DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13709. SLAVIN *v.* TOLEDO, ST. LOUIS & WESTERN RAILROAD CO. Decided March 18, 1913. ERROR to Circuit Court of Lucas county. *Mr. Charles H. Masters* and *Messrs. Kohn, Northrup & Morgan*, for plaintiff in error. *Mr. Charles A. Schmettau*; *Mr. Lloyd T. Williams* and *Mr. Clarence Brown*, for defendant in error. *Mr. Orville S. Brumback*, *amicus curiae*. Judgment of the circuit court reversed and that of the common pleas affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13725. THE MARBLE & SHATTUCK CHAIR CO. *v.* MONDRAZECKI. Decided March 18, 1913. ERROR to Circuit Court of Cuyahoga county.

Without Opinion.

Messrs. Reed & Eichelberger, for plaintiff in error. *Mr. H. G. Powell*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13897. THE STATE OF OHIO *v.* MOATS. Decided March 18, 1913. ERROR to Circuit Court of Perry county. *Mr. Tom O. Crossan*, prosecuting attorney, for plaintiff in error. *Mr. T. M. Potter*, for defendant in error. Judgment affirmed upon the ground firstly stated in entry of circuit court, and not considered here, that verdict was against the weight of the evidence; ground lastly stated in entry of circuit court not approved. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13044. FURSTE *v.* THE HENDERSON LITHOGRAPHING Co. Decided March 25, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Littleford, James, Frost & Foster*, for plaintiff in error. *Mr. Mitchell Wilby*; *Mr. Charles B. Wilby* and *Messrs. Robertson & Buchwalter*, for defendant in error. Judgment reversed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13075. PATTERSON *v.* THE TOLEDO & OHIO CENTRAL RAILWAY Co. Decided March 25, 1913. ERROR to Circuit Court of Crawford county.

Cases Reported

Messrs. Beer & Wright, for plaintiff in error. *Messrs. Finley & Gallinger and Messrs. Doyle & Lewis*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13082. *McGHEE v. HOTSENPILLER*, GDN., ETC. Decided March 25, 1913. ERROR to Circuit Court of Union county. *Mr. M. U. Ricketts*, for plaintiff in error. *Messrs. Hoopes, Robinson & Hoopes*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13084. *THE COLUMBUS GAS & FUEL CO. v. CASEY*. Decided March 25, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Addison & Addison*, for plaintiff in error. *Messrs. Lentz, Karns, Linton & Hengst*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13085. *YOUNG ET AL. v. LINDSAY, TREASURER, ET AL.* Decided March 25, 1913. ERROR to Circuit Court of Franklin county. *Mr. J. C. L. Pugh and Messrs. Pugh & Pugh*, for plaintiffs in error. *Mr. Edward C. Turner*, prosecuting attorney, and *Mr. H. S. Ballard*, assistant prosecuting attorney, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13095. THE STATE, EX REL. MARANI, *v.* WRIGHT, AUDITOR. Decided March 25, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. Newton D. Baker*, for plaintiff in error. *Messrs. Wing, Myler & Turney*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13102. MCGUFFIN ET AL. *v.* COPELAND ET AL. Decided March 25, 1913. ERROR to Circuit Court of Gallia county. *Mr. E. D. Davis; Mr. R. J. Mauck and Mr. Thomas E. Powell*, for plaintiffs in error. *Mr. R. M. Switzer*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13111. THE M. WERK Co. *v.* THE RYAN SOAP Co. Decided March 25, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Hosea & Knight*, for plaintiff in error. *Mr. Thomas J. Cogan; Mr. Charles F. Williams and Mr. Howard N. Ragland*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13113. THE STATE, EX REL. SIMPSON, PROSECUTING ATTORNEY, *v.* THE BALTIMORE & OHIO RAILROAD Co. Decided March 25, 1913. ERROR to Circuit Court of Holmes county. *Mr.*

Cases Reported

D. T. Simpson and Mr. F. S. Monnett, for plaintiff in error. *Messrs. Arrel, Wilson, Harrington & DeFord and Mr. George W. Sharp*, for defendant in error. Judgment affirmed on authority of *P. C. C. & St. L. Ry. Co. v. Cox*, 55 Ohio St., 497. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13114. THE STATE, EX REL. SIMPSON, PROSECUTING ATTORNEY, *v.* THE PENNSYLVANIA CO. ET AL. Decided March 25, 1913. ERROR to Circuit Court of Holmes county. *Mr. D. T. Simpson and Mr. F. S. Monnett*, for plaintiff in error. *Messrs. Carey & Mullins; Mr. George W. Sharp and Messrs. Allen, Waters, Young & Andress*, for defendants in error. Judgment affirmed on authority of *P. C. C. & St. L. Ry. Co. v. Cox*, 55 Ohio St., 497. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13120. FISH *v.* CHAMBERLAIN ET AL. Decided March 25, 1913. ERROR to Circuit Court of Geauga county. *Mr. William G. King and Mr. George W. Alvord*, for plaintiff in error. *Mr. H. O. Bostwick*, for defendants in error. Judgment reversed and judgment for plaintiff in error. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER NEWMAN and WILKIN, JJ., concur.

No. 13794. THE STATE, EX REL. FERRIS, *v.* LARKIN, AUDITOR, ET AL. Decided March 25, 1913. ERROR to Circuit Court of Clermont county.

Without Opinion.

Messrs. Kinhead & Rogers; Messrs. Healy, Ferris & McAvoy and Mr. Lewis Hicks, for plaintiff in error. *Mr. Daniel W. Murphy*, prosecuting attorney, and *Mr. Hugh L. Nichols*, for defendants in error. Judgment affirmed on grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, affirmed, it appearing from the record that there is an unliquidated amount due to Clermont county for taxes from the relator upon the property conveyed by him to Clermont county, and that whatever amount of taxes is now due and owing by said relator is a valid offset against the balance of the purchase price of said property, and that said relator is not, therefore, entitled to a peremptory writ of mandamus requiring the auditor and treasurer of Clermont county, respectively, to issue and pay a warrant for \$6,000 out of the special fund created by the sale of bonds as above set forth. DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13833. THE STATE OF OHIO *v.* HABER-CORN. Decided March 25, 1913. ERROR to Circuit Court of Clark county. *Mr. Lawrence E. Laybourne*, prosecuting attorney; *Mr. J. A. White; Mr. W. B. Wheeler and Mr. George W. Crabbe*, for plaintiff in error. *Mr. James B. Malone*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

Cases Reported

No. 13834. THE STATE OF OHIO *v.* HABERCORN. Decided March 25, 1913. ERROR to Circuit Court of Clark county. *Mr. Lawrence E. Laybourne*, prosecuting attorney; *Mr. J. A. White*; *Mr. W. B. Wheeler* and *Mr. George W. Crabbe*, for plaintiff in error. *Mr. James B. Malone*, for defendant in error. Judgment of the circuit court reversed and judgment of the mayor's court affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13835. THE STATE OF OHIO *v.* HABERCORN. Decided March 25, 1913. ERROR to Circuit Court of Clark county. *Mr. Lawrence Laybourne*, prosecuting attorney; *Mr. J. A. White*; *Mr. W. B. Wheeler* and *Mr. G. W. Crabbe*, for plaintiff in error. *Mr. James B. Malone*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13836. THE STATE OF OHIO *v.* HABERCORN. Decided March 25, 1913. ERROR to Circuit Court of Clark county. *Mr. Lawrence E. Laybourne*, prosecuting attorney; *Mr. J. A. White*; *Mr. W. B. Wheeler* and *Mr. G. W. Crabbe*, for plaintiff in error. *Mr. James B. Malone*, for defendant in error. Judgment of the circuit court reversed and that of the mayor's court affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13837. *THE STATE OF OHIO v. HABERCORN*. Decided March 25, 1913. ERROR to Circuit Court of Clark county. *Mr. Lawrence E. Laybourne*, prosecuting attorney; *Mr. J. A. White*; *Mr. W. B. Wheeler* and *Mr. G. W. Crabbe*, for plaintiff in error. *Mr. James B. Malone*, for defendant in error. Judgment of the circuit court reversed and that of the mayor's court affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13076. *HILEMAN ET AL. v. McELROY ET AL.* Decided March 28, 1913. ERROR to Circuit Court of Wayne county. *Messrs. McClaran & Jones*, for plaintiffs in error. *Mr. A. D. Metz*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON and WILKIN, JJ., concur.

No. 13083. *DUSENBURY v. SAUNDERS ET AL.* Decided March 28, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Addison & Addison*, for plaintiff in error. *Messrs. Vorys, Sater, Seymour & Pease*, for defendants in error. Judgment reversed for reasons stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed for error of the circuit court in modifying and affirming the judgment of the common pleas court. And coming now to render the judgment that should have been rendered by said circuit court, it is hereby ordered

Cases Reported

and adjudged that the judgment of said court of common pleas be and the same is hereby reversed for error of said court in admitting in evidence, on behalf of the plaintiff, pages from the books of plaintiff purporting to show this account, and in reading therefrom; for error of said court in excluding the evidence offered by plaintiff in error touching the cost of material and the amount that had been added thereto for profits; and for error of said court in its charge to the jury as to the burden of proof. DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13100. SWARTS *v.* SIEGEL, ADMINISTRATOR. Decided March 28, 1913. ERROR to Circuit Court of Franklin county. *Mr. R. S. Sweptson*, for plaintiff in error. *Mr. F. Siegel* and *Mr. J. V. Lee*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13101. BLAKE *v.* FRERICK, AN INFANT, BY ETC. Decided March 28, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. P. H. Kaiser*, for plaintiff in error. *Messrs. Webber & Metcalf*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE and WANAMAKER, JJ., concur.

No. 13106. JONES, ADMINISTRATOR, *v.* MASON. Decided March 28, 1913. ERROR to Circuit Court of Ashland county. *Mr. W. S. Kerr*; *Messrs.*

Without Opinion.

McCray & McCray and *Mr. H. A. Mykrantz*, for plaintiff in error. *Mr. F. N. Patterson; Mr. Vernon H. Burke* and *Messrs. Nicol & Boffenmyer*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13108. *DAY, SR., v. DODDS*. Decided March 28, 1913. ERROR to Circuit Court of Pike county. *Mr. John A. Eylar*, for plaintiff in error. *Mr. John C. Milner* and *Mr. F. E. Dougherty*, for defendant in error. Judgment affirmed. SHAUCK, C. J. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13109. *McCREDIE v. MUSSON*. Decided March 28, 1913. ERROR to Circuit Court of Lucas county. *Mr. Orion W. Nelson*, for plaintiff in error. *Mr. Marion D. Merrick* and *Mr. George F. Wells*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13110. *THE S. H. COHN CO. v. SIMON*. Decided March 28, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Hidy, Klein & Harris*, for plaintiff in error. *Mr. Martin W. Sanders* and *Mr. W. D. Meals*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER. NEWMAN and WILKIN, JJ., concur.

Cases Reported.

No. 13121. KELL ET AL. *v.* WARD ET AL. Decided March 28, 1913. ERROR to Circuit Court of Clermont county. *Messrs. Griffith & Nichols* and *Mr. W. A. Joseph*, for plaintiffs in error. *Mr. S. A. West* and *Mr. D. W. Murphy*, for defendants in error. Judgment affirmed. DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13124. THE ADAMS EXPRESS CO. *v.* WHITTINGTON, AN INFANT, BY ETC. Decided March 28, 1913. ERROR to Circuit Court of Greene county. *Mr. Charles L. Darlington* and *Mr. Joseph S. Graydon*, for plaintiff in error. *Mr. E. D. Smith*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13127. SOUDRIETT *v.* THE HOME BREWING CO. ET AL. Decided March 28, 1913. ERROR to Circuit Court of Lucas county. *Messrs. Brown, Hahn, Sanger & Froelich*, for plaintiff in error. *Messrs. James, Garver & Powell*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13129. SHEARER *v.* DOWELL. Decided March 28, 1913. ERROR to Circuit Court of Portage county. *Messrs. Webb & Webb*, for plaintiff in error. *Mr. J. W. Beckley* and *Mr. H. R. Loomis*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13134. *THE FEDERAL GAS & FUEL CO. v. THE CITY OF COLUMBUS.* Decided March 28, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Williams, Williams, Taylor & Nash* and *Mr. L. B. Denning*, for plaintiff in error. *Mr. E. L. Weinland*, city solicitor, and *Mr. B. W. Gearheart*, assistant city solicitor, for defendant in error. Judgment affirmed. Grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is affirmed; this court finding that no final decree or judgment was made in the court of common pleas in said proceeding.

It is further ordered and adjudged that this cause be remanded to the court of common pleas for further proceedings according to law, and the right is reserved to the plaintiff in error to ask for such order, judgment and decree (and for the reconsideration of any order that may have been heretofore made by said court of common pleas) as it may be entitled to, before the entry of the final judgment and decree in said cause. *SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.*

No. 13157. *JONES ET AL. v. JONES BROTHERS.* Decided March 28, 1913. ERROR to Circuit Court of Knox county. *Mr. J. M. McGillivray; Messrs. Waight & Moore* and *Mr. W. Z. Davis*, for plaintiff in error. *Mr. Frank W. Owen* and *Mr. Ferdinand Jelke, Jr.*, for defendant in error. Judg-

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ment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13165. RODGERS *v.* REICHLEY, EXECUTOR. Decided March 28, 1913. ERROR to Circuit Court of Coshocton county. *Mr. George D. Klein* and *Mr. W. S. Merrell*, for plaintiff in error. *Messrs. Duncan & Voorhees* and *Mr. F. E. Pomerene*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 12966. AMES *v.* CZIHY, AN INFANT, BY ETC. Decided April 15, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. George D. Hile*, for plaintiff in error. *Mr. E. F. Spurney* and *Mr. R. C. Linder*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13077. SCHABER, EXECUTOR, *v.* YOUNG. Decided April 15, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Howland, Moffett & Niman*, for plaintiff in error. *Mr. E. Jay Pinney* and *Mr. Herman J. Nord*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13105. WALSH *v.* THE HOWE SCALE CO. Decided April 15, 1913. ERROR to Circuit Court of Summit county. *Mr. D. F. Felmly* and *Mr. J.*

Without Opinion.

C. Frank, for plaintiff in error. *Messrs. Wilcox, Parsons, Burch & Adams*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13150. THE PROVIDENT SAVINGS LIFE ASSURANCE SOCIETY OF N. Y. *v.* STATLER. Decided April 15, 1913. ERROR to Circuit Court of Miami county. *Messrs. Broomhall & Broomhall* and *Mr. Charles C. Lockwood*, for plaintiff in error. *Mr. Ferdinand Jelke, Jr.*, and *Mr. C. B. Jamison*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13205. THE BOARD OF EDUCATION OF CONCORD SPECIAL SCHOOL DISTRICT No. 8 IN SYCAMORE TOWNSHIP *v.* BOARD OF EDUCATION OF BLUE ASH SPECIAL SCHOOL DISTRICT No. 16 IN SYCAMORE TOWNSHIP. Decided April 15, 1913. ERROR to Circuit Court of Hamilton county. *Mr. H. H. Hosbrook*, for plaintiff in error. *Mr. Charles W. Hoffman*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13456. KATZ, DOING BUSINESS AS ACME BRASS CO., *v.* LINDER. Decided April 15, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. Joseph C. Bloch*, for plaintiff in error. *Mr. Joseph*

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L. Stern, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13720. FAWCETT, ADMINISTRATOR, *v.* SUMMERS. Decided April 15, 1913. ERROR to Circuit Court of Columbiana county. *Mr. K. L. Cobourn*, for plaintiff in error. *Messrs. Metzger & Smith*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13868. THE STATE OF OHIO *v.* GASKINS. Decided April 15, 1913. ERROR to Circuit Court of Clermont County. *Mr. Daniel W. Murphy*, prosecuting attorney; *Mr. Timothy S. Hogan*, attorney general, and *Mr. Charles C. Marshall*, assistant attorney general, for plaintiff in error. *Mr. Charles C. Kearns*; *Mr. O. P. Griffith* and *Mr. C. B. Nichols*, for defendant in error. Judgment affirmed on following grounds: 1. Error in limiting unduly cross-examination of prosecuting witness; 2. misconduct of prosecuting attorney. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13904. CAIN *v.* THE PEOPLE'S SALARY LOAN Co. Decided April 15, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Gumble & Gumble* and *Mr. Q. R. Lane*, for plaintiff in error. *Mr. B. W. Gearheart*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13879. **THE STATE OF OHIO v. RADELOFF.** Decided April 15, 1913. Exception by Prosecuting Attorney to Decision of Common Pleas Court of Hamilton county. *Mr. Thomas L. Pogue*, prosecuting attorney, and *Mr. Carl M. Jacobs, Jr.*, assistant prosecuting attorney, for the exceptions. *Mr. Louis B. Sawyer*, against the exceptions. Exceptions overruled. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13920. **SHARP v. THE STATE OF OHIO.** Decided April 15, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Gumble & Gumble* and *Mr. Q. R. Lane*, for plaintiff in error. *Mr. Timothy S. Hogan*, attorney general; *Mr. George B. Okey*; *Mr. Hanby R. Jones* and *Mr. Hugh Huntington*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 12843. **THE CITY OF TOLEDO v. COOLEY.** Decided April 22, 1913. ERROR to Circuit Court of Lucas county. *Mr. Cornell Schreiber*, city solicitor, and *Mr. Ashton H. Coldham*, for plaintiff in error. *Mr. M. O. Rettig* and *Messrs. Mulholland & Hartmann*, for defendant in error. On rehearing. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 12844. *THE CITY OF TOLEDO v. TRESSLER*. Decided April 22, 1913. ERROR to Circuit Court of Lucas county. *Mr. Cornell Schreiber*, city solicitor, and *Mr. Ashton H. Coldham*, for plaintiff in error. *Mr. Karl A. Flickinger*, for defendant in error. On rehearing. Judgment affirmed. *JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ.*, concur.

No. 12923. *HOFFMASTER v. THE G. M. McKELVEY Co. ET AL.* Decided April 22, 1913. ERROR to Circuit Court of Mahoning county. *Mr. Samuel M. Thompson* and *Mr. Charles Koonce, Jr.*, for plaintiff in error. *Mr. Horace T. Smith; Messrs. Arrel, Wilson & Harrington* and *Messrs. Smith & Johnson*, for defendants in error. Judgment reversed and final judgment in favor of *Levi Hoffmaster* and *Margaret Patterson*.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and the court finds that the judgment of the plaintiff below, *The G. M. McKelvey Company*, is not a valid lien on the premises described in the petition, said judgment having been rendered on the appearance of defendant, being entered under authority of a joint warrant of attorney against one of the parties to such warrant; it appearing on the face of the record that the other party signing such warrant of attorney had died prior to the entry of such appearance, said joint power was revoked by power of law. And the court finds that the judgments

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of said Levi Hoffmaster, plaintiff in error, and Margaret Patterson are valid and subsisting liens on said premises and that they are entitled to the relief prayed for in their cross-petitions.

It is, therefore, ordered and adjudged that this cause be remanded to the court of appeals, with instructions to ascertain and fix the amounts due on the judgments of Levi Hoffmaster and Margaret Patterson, and enter decree that the same are valid and subsisting liens on the premises described in the petition, and for further proceedings according to law. SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13092. COWIE, EXECUTRIX, *v.* MEYERS ET AL. Decided April 22, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Charles W. Baker and Messrs. Galvin & Bauer*, for plaintiff in error. *Messrs. Workum & Bowdle; Mr. Otis H. Fisk; Mr. Henry B. McClure and Mr. Aaron A. Ferris*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13112. GANS *v.* GARDNER ET AL. Decided April 22, 1913. ERROR to Circuit Court of Stark county. *Mr. Lorin C. Wise*, for plaintiff in error. *Messrs. Lynch & Day and Messrs. Willison & Willison*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

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No. 13117. *SHAW v. SHAW*. Decided April 22, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Closs & Luebbert*, for plaintiff in error. *Mr. Carl Phares* and *Messrs. Hosea & Knight*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., DONAHUE and NEWMAN, JJ.*, concur.

No. 13123. *MATHERS v. MATHERS*. Decided April 22, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Charles B. Wilby* and *Mr. Mitchell Wilby*, for plaintiff in error. *Mr. Thomas J. Cogan; Mr. Charles F. Williams* and *Mr. Howard N. Ragland*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., DONAHUE and NEWMAN, JJ.*, concur.

No. 13149. *THE VILLAGE OF OTTAWA v. KERSTING, COUNTY AUDITOR, ET AL.* Decided April 22, 1913. ERROR to Circuit Court of Putnam county. *Messrs. Bailey & Leasure*, for plaintiff in error. *Mr. J. W. Smith*, for defendants in error. Judgment affirmed. *JOHNSON, WANAMAKER and WILKIN, JJ.*, concur.

No. 13388. *THE CARD & PROSSER COAL CO. v. SNYDER*. Decided April 22, 1913. ERROR to Circuit Court of Columbiana county. *Messrs. Billingsley, Clark & Moore*, for plaintiff in error. *Messrs. W. S. Anderson & Son* and *Mr. C. S. Speaker*, for defendant in error. Judgment affirmed. *JOHNSON, WANAMAKER and WILKIN, JJ.*, concur.

Without Opinion.

No. 13474. *MATHERS v. MATHERS*. Decided April 22, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Charles B. Wilby*, for plaintiff in error. *Mr. Thomas J. Cogan; Mr. Charles F. Williams* and *Mr. Howard N. Ragland*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13722. *THE OHIO & PENNSYLVANIA COAL Co. v. RANKINE, ADMX.* Decided April 22, 1913. ERROR to Circuit Court of Jefferson county. *Messrs. Blandin, Hogsett & Ginn* and *Messrs. Mansfield & Merryman*, for plaintiff in error. *Messrs. Erskine & Smith*, for defendant in error. Judgment affirmed on authority of *Saxton v. Seiberling*, 48 Ohio St., 559. SHAUCK, C. J., DONAHUE, WILKIN and NEWMAN, JJ., concur. JOHNSON and WANAMAKER, JJ., concur on other grounds.

No. 13782. *ZINN v. FERRIS, EXECUTOR, ETC., ET AL.* Decided April 22, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Healy, Ferris & McAvoy* and *Mr. Louis A. Ireton*, for plaintiff in error. *Mr. Rufus B. Smith; Mr. Charles B. Wilby; Mr. Aaron A. Ferris* and *Messrs. Bruce & Bruce*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13783. *THE CITY OF DAYTON v. GOLDSBERRY*. Decided April 22, 1913. ERROR to Cir-

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cuit Court of Montgomery county. *Mr. Frank S. Breene; Mr. Albert J. Dwyer and Mr. John Roehm*, for plaintiff in error. *Mr. D. B. VanPelt and Mr. Roy G. Fitzgerald*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13972. KUNZ, ON BEHALF OF HIMSELF ET AL., *v.* LEY, COUNTY TREASURER, ET AL. Decided April 22, 1913. ERROR to Circuit Court of Tuscarawas county. *Mr. E. E. Lindsey and Mr. A. W. Elson*, for plaintiff in error. *Mr. W. V. Wright*, prosecuting attorney; *Mr. Timothy S. Hogan*, attorney general, and *Mr. Clarence D. Laylin*, for defendants in error. Judgment affirmed. JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13803. NEVINS, A TAXPAYER, *v.* WIGGIM, COUNTY TREASURER, ET AL. Decided April 22, 1913. ERROR to Circuit Court of Montgomery county. *Mr. Daniel Nevins and Messrs. Nevin, Nevin & Kalbfus*, for plaintiff in error. *Mr. Robert C. Patterson*, prosecuting attorney; *Mr. Clement R. Gilmore*, assistant prosecuting attorney, and *Mr. Carl W. Lentz*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN JJ., concur.

No. 13807. THE CITY OF LANCASTER *v.* KIGER. Decided April 22, 1913. ERROR to Circuit Court

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of Fairfield county. *Mr. Van A. Snider*, city solicitor, for plaintiff in error. *Mr. C. W. McCleery* and *Mr. Charles M. Courtright*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13086. THE CITY OF ZANESVILLE *v.* STOTTS. Decided April 29, 1913. ERROR to Circuit Court of Muskingum county. *Mr. T. F. Thompson*, city solicitor, for plaintiff in error. *Messrs. Winn & Bassett*, for defendant in error. Judgment reversed and cause remanded.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed.

The court finds that the trial court erred in overruling the motion of the defendant below to direct a verdict at the close of the plaintiff's evidence, but that, inasmuch as the defendant did not renew the motion at the close of all the testimony, the circuit court did not err in refusing to enter judgment for the said city of Zanesville, but the court further finds on the conceded facts that the circuit court did err in refusing to reverse the judgment and remand the case of a new trial.

And coming now to render the judgment that the circuit court should have rendered, it is ordered and adjudged that the judgments of the courts below be reversed and that this cause be remanded to the court of common pleas for further pro-

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ceedings according to law. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13116. THE BRUNSWICK-BALKE-COLLENDER CO. *v.* GERSTLE ET AL. Decided April 29, 1913. ERROR to Circuit Court of Mahoning county. *Messrs. Mayer, Meyer, Austrian & Platt; Mr. Joseph Wilby* and *Mr. L. H. E. Lowry*, for plaintiff in error. *Messrs. Wirt & Gunlefinger*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13130. ROBERTS, DOING BUSINESS AS ROBERTS MACHINE CO., *v.* JACKMAN. Decided April 29, 1913. ERROR to Circuit Court of Columbiana county. *Mr. W. S. Potts*, for plaintiff in error. *Mr. W. F. Lones*, for defendant in error. Judgment vacated and cause remanded to the court of appeals with instructions to consider the weight of the evidence. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13131. MARCHAND ET AL. *v.* SWITTER. Decided April 29, 1913. ERROR to Circuit Court of Stark county. *Mr. Harry Frease*, for plaintiffs in error. *Mr. D. F. Reinoehl*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

Without Opinion.

No. 13133. THE MERCHANTS OIL & GAS CO. *v.* THE CAMP GLASS CO. Decided April 29, 1913. ERROR to Circuit Court of Knox county. *Mr. William G. Koons; Mr. William M. Koons and Mr. David F. Ewing*, for plaintiff in error. *Mr. F. O. Levering*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13135. STONEMAN *v.* STONEMAN, ETC. Decided April 29, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Turner & Jones*, for plaintiff in error. *Mr. William Herbert Page; Mr. Walter S. Page and Mr. Marcus Shoup*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13156. SCHLATTER *v.* WALTER ET AL. Decided April 29, 1913. ERROR to Circuit Court of Lucas county. *Mr. Harry Levison*, for plaintiff in error. *Mr. John Schlatter and Messrs. Handy & Wolf*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13188. THE DAYTON & TROY ELECTRIC RY. CO. *v.* McELWAIN. Decided April 29, 1913. ERROR to Circuit Court of Miami county. *Messrs. Broomhall & Broomhall and Messrs. McMahon & McMahon*, for plaintiff in error. *Mr. James*

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B. Malone and Mr. Thomas B. Kyle, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13210. KATSAMPOS ET AL. *v.* HULL. Decided April 29, 1913. ERROR to Circuit Court of Licking county. *Messrs. Kibler & Kibler*, for plaintiffs in error. *Messrs. Jones & Jones and Mr. B. F. McDonald*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13216. CASTNER ET AL. *v.* THE STUBENVILLE & EAST LIVERPOOL RAILWAY & LIGHT CO. ET AL. Decided April 29, 1913. ERROR to Circuit Court of Jefferson county. *Mr. D. M. Gruber and Mr. J. A. Mansfield*, for plaintiffs in error. *Messrs. Miller & Miller; Mr. Jay S. Paisley and Mr. John A. Huston*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13217. DAGGER ET AL. *v.* MCCLELLAN. Decided April 29, 1913. ERROR to Circuit Court of Champaign county. *Mr. J. E. Bowman; Messrs. Waite & Deaton and Mr. T. B. Owen*, for plaintiffs in error. *Messrs. Buroker & Zimmer; Mr. E. L. Bodey and Mr. Louis D. Johnson*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

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No. 13220. KENNEDY *v.* THE CLINTON COUNTY FAIR CO. ET AL. Decided April 29, 1913. ERROR to Circuit Court of Clinton county. *Mr. C. W. Swaim*, for plaintiff in error. *Messrs. Smith & Clevenger*; *Mr. D. K. Hempstead* and *Mr. J. M. Morton*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON and NEWMAN, JJ., concur.

No. 13863. WARNER, EXR., *v.* McCAMMON ET AL. Decided April 29, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Herman P. Goebel* and *Mr. Oliver M. Dock*, for plaintiff in error. *Mr. Wallace Burch* and *Messrs. Healy, Ferris & McAvoy*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13877. THE BOARD OF COUNTY COMMISSIONERS OF LUCAS COUNTY ET AL. *v.* ENGLISH. Decided April 29, 1913. ERROR to Circuit Court of Lucas county. *Mr. Holland C. Webster*, prosecuting attorney; *Mr. Charles M. Milroy*, prosecuting attorney; *Mr. Lewis E. Mallow*, assistant prosecuting attorney, and *Mr. Charles H. Hatfield*, prosecuting attorney, for plaintiffs in error. *Mr. Edgar M. Flowers* and *Messrs. Marshall & Fraser*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13919. IN RE ESTATE OF GILLIAM, DECEASED. Decided April 29, 1913. ERROR to Circuit Court of Stark county. *Mr. J. A. Jeffers* and *Messrs. Welty & Albaugh*, for exceptor and plaintiff in error. *Mr. J. Whiting, Jr.*, and *Messrs. Waight & Moore*, for executor and defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13069. LOGUE *v.* NACHTRIEB ET AL. Decided May 6, 1913. ERROR to Circuit Court of Wayne county. *Mr. M. L. Spooner*; *Mr. John McSweeney* and *Mr. H. R. Smith*, for plaintiff in error. *Mr. Wayne Hart* and *Mr. James B. Taylor*, for defendants in error. On rehearing. Former judgment adhered to. SHAUCK, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13122. THE PORTSMOUTH MACHINE & CASTING Co. *v.* BATES. Decided May 6, 1913. ERROR to Circuit Court of Scioto county. *Mr. George M. Osborn*, for plaintiff in error. *Messrs. Milner, Miller & Searl*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13144. SCHIFFEL *v.* ECKERMAN ET AL. Decided May 6, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. S. N. Schwartz*, for plaintiff in error. *Mr. Frank E. Dellenbaugh* and

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Mr. Frederick F. Klingman, for defendants in error. Judgment reversed and cause remanded to the court of common pleas with direction to overrule demurrer to petition. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13146. BOSWELL, ADMR., *v.* THE LAKE SHORE ELECTRIC RY. CO. Decided May 6, 1913. ERROR to Circuit Court of Huron county. *Mr. Rupert Holland* and *Mr. Jesse Vickery*, for plaintiff in error. *Mr. A. V. Andrews*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13170. MILLER ET AL. *v.* MILLER. Decided May 6, 1913. ERROR to Circuit Court of Guernsey county. *Mr. John C. Adams* and *Mr. Thomas H. Wheeler*, for plaintiffs in error. *Mr. Abbe L. Jones*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13178. THE STRATTON FIRE CLAY CO. *v.* THE SMALLWOOD STONE CO. Decided May 6, 1913. ERROR to Circuit Court of Jefferson county. *Mr. D. M. Gruber*, for plaintiff in error. *Mr. R. G. Porter*; *Mr. P. P. Lewis* and *Mr. W. R. Alban*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

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No. 13209. *MILLER v. BASORE ET AL.* Decided May 6, 1913. ERROR to Circuit Court of Lorain county. *Mr. L. B. Fauver* and *Mr. R. H. Rice*, for plaintiff in error. *Mr. George L. Glitsch*, for defendants in error. Judgment affirmed. *JOHNSON, WANAMAKER* and *WILKIN, JJ.*, concur.

No. 13223. *THE VILLAGE OF CADIZ v. TIMMONS.* Decided May 6, 1913. ERROR to Circuit Court of Harrison county. *Mr. Albert O. Barnes* and *Mr. R. H. Minter*, for plaintiff in error. *Messrs. Hollingsworth & Worley*, for defendant in error. Judgment affirmed. *JOHNSON, WANAMAKER* and *WILKIN, JJ.*, concur.

No. 13233. *THE NATIONAL INSURANCE CO. OF CINCINNATI v. MINCKS ET AL.* Decided May 6, 1913. ERROR to Circuit Court of Harrison county. *Mr. J. L. Kohl* and *Messrs. Hollingsworth & Worley*, for plaintiff in error. *Mr. Albert O. Barnes*, for defendants in error. Judgment affirmed. *JOHNSON, WANAMAKER* and *WILKIN, JJ.*, concur.

No. 13370. *LOOKER ET AL. v. WADSWORTH.* Decided May 6, 1913. ERROR to Circuit Court of Summit county. *Mr. Edward F. Voris* and *Messrs. Wilcox, Burch & Adams*, for plaintiffs in error. *Messrs. Boylan & Brouse*, for defendant in error. Judgment affirmed. *SHAUCK, C. J.*, *DONAHUE* and *NEWMAN, JJ.*, concur.

Without Opinion.

No. 13870. KRUMM ET AL. *v.* HARRIS. Decided May 6, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Williams, Williams, Taylor & Nash* and *Mr. W. T. Spear*, for plaintiffs in error. *Messrs. Pugh & Pugh* and *Mr. J. M. Sheets*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13973. LOTT *v.* THE STATE OF OHIO. Decided May 6, 1913. ERROR to Circuit Court of Darke county. *Mr. H. L. Yount*, for plaintiff in error. *Mr. John F. Maher* and *Mr. L. E. Kerlin*, prosecuting attorneys; *Mr. A. H. Meeker* and *Mr. D. W. Bowman*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13137. WESTWATER ET AL., PARTNERS, *v.* FEDERAL UNION SURETY CO. Decided May 13, 1913. ERROR to Circuit Court of Franklin county. *Mr. James M. Butler* and *Mr. J. G. Westwater*, for plaintiffs in error. *Messrs. Bennett & Westfall*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13140. BELCHER *v.* RICHART. Decided May 13, 1913. ERROR to Circuit Court of Scioto county. *Messrs. Holcomb & Millar*, for plaintiff

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in error. *Mr. Noah J. Dever*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13143. THE HARDESTY MANUFACTURING Co. *v.* THE RICE VENEER & LUMBER Co. Decided May 13, 1913. ERROR to Circuit Court of Tuscarawas county. *Mr. J. G. Patrick*, for plaintiff in error. *Mr. Ed. C. Seikel*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13161. KUMP *v.* THE KILBY MANUFACTURING Co. Decided May 13, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. C. W. Dille* and *Mr. H. C. Boyd*, for plaintiff in error. *Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13163. HUMPHREYS ET AL. *v.* LOOMIS ET AL. Decided May 13, 1913. ERROR to Circuit Court of Summit county. *Messrs. Slaybaugh, Seiberling & Huber* and *Messrs. Lyon & Hunter*, for plaintiffs in error. *Mr. Edwin F. Voris* and *Mr. Samuel G. Rogers*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE and NEWMAN, JJ., concur.

Without Opinion.

No. 13190. *RICE v. THE HOCKING VALLEY RAILWAY Co.* Decided May 13, 1913. ERROR to Circuit Court of Hocking county. *Mr. A. E. Jacobs*, for plaintiff in error. *Mr. John F. Wilson; Mr. T. S. Hogan* and *Mr. J. M. McGillivray*, for defendant in error. Judgment affirmed on ground that verdict for original defendant should have been directed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents. ———

No. 13191. *THE CITY OF CINCINNATI v. GEORGE & ALLAN.* Decided May 13, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Edward M. Ballard* and *Mr. Alfred Bettman*, city solicitors, and *Mr. Geoffrey Goldsmith* and *Mr. Coleman Avery*, assistant city solicitors, for plaintiff in error. *Messrs. Littleford, James, Frost & Foster*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. ———

No. 13226. *DONALDSON v. THE CADIZ GAS Co. ET AL.* Decided May 13, 1913. ERROR to Circuit Court of Harrison county. *Mr. R. H. Minteer*, for plaintiff in error. *Messrs. Hollingsworth & Worley*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur. ———

No. 13235. *HACKENBERG v. HACKENBERG.* Decided May 13, 1913. ERROR to Circuit Court of

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Cuyahoga county. *Messrs. Cushing, Siddall & Palmer* and *Mr. A. E. Powell*, for plaintiff in error. *Messrs. Squire, Sanders & Dempsey*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13236. THE SUPERIOR COAL CO. *v.* THE MACKELDUM MINING CO. Decided May 13, 1913. ERROR to Circuit Court of Jefferson county. *Mr. T. S. Hogan* and *Mr. Joseph McGhee*, for plaintiff in error. *Mr. J. M. McGillivray*; *Mr. Wallace D. Yapple* and *Mr. Walter W. Boulger*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13244. LONG ET AL., ADMRS., *v.* LIEBHERR ET AL. Decided May 13, 1913. ERROR to Circuit Court of Wood county. *Messrs. Bailey & Leasure* and *Mr. Lawrence F. Conway*, for plaintiffs in error. *Mr. Edward Beaverstock*; *Mr. Benjamin F. James* and *Messrs. McClelland & Bowman*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13246. THE CITY OF CINCINNATI *v.* ARMSTRONG. Decided May 13, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Edward M. Ballard* and *Mr. Alfred Bettman*, city solicitors,

Without Opinion.

and *Mr. Constant Southworth* and *Mr. Coleman Avery*, assistant city solicitors, for plaintiff in error. *Mr. Harry J. Wernke* and *Mr. Herman J. Guckenberg*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13254. THE HARRISON & JEFFERSON TELEPHONE Co. *v.* CARTER. Decided May 13, 1913. ERROR to Circuit Court of Jefferson county. *Messrs. Hollingsworth & Worley*, for plaintiff in error. *Mr. Frank H. Kerr*, for defendant in error. Judgment reversed and judgment for plaintiff in error. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13259. MEAD, JR., *v.* BROWN ET AL., PARTNERS AS JANE BROWN & SONS. Decided May 13, 1913. ERROR to Circuit Court of Licking county. *Mr. J. V. Hilliard*, for plaintiff in error. *Messrs. Flory & Flory*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13299. THE LOUISVILLE & CINCINNATI PACKET Co. *v.* LONG. Decided May 13, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Stephens, Lincoln & Stephens*, for plaintiff in error. *Mr. Chas. Broadwell*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

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No. 13310. SCHMIDT *v.* THE ERIE RAILROAD Co. Decided May 13, 1913. ERROR to Circuit Court of Summit county. *Messrs. Musser, Kimber & Huffman* and *Mr. H. J. Nord*, for plaintiff in error. *Messrs. Cushing, Siddall & Palmer* and *Messrs. Rogers & Rowley*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13418. WOLFCALF, ADMX., *v.* MINCK. Decided May 13, 1913. ERROR to Circuit Court of Mahoning county. *Mr. D. J. Hartwell* and *Mr. Frank Jacobs*, for plaintiff in error. *Mr. D. F. Anderson*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13461. MAXWELL ET AL., EXRS., *v.* HOLLAND, ADMR. Decided May 13, 1913. ERROR to Circuit Court of Greene county. *Messrs. Maxwell & Maxwell* and *Mr. C. L. Spencer*, for plaintiffs in error. *Mr. M. R. Snodgrass*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13521. DUBROY, ADMX., *v.* THE MARBLE & SHATTUCK CHAIR Co. Decided May 13, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Hart, Canfield & Croke*, for plaintiff in error. *Mr. L. B. Bacon*, for defendant in error.

Without Opinion.

Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13878. WONSETLER *v.* HYLAND, CLERK. Decided May 13, 1913. ERROR to Circuit Court of Mahoning county. *Messrs. Kistler & Oesch* and *Messrs. W. S. Anderson & Son*, for plaintiff in error. *Mr. David G. Jenkins*, for defendant in error. Judgment of the circuit court reversed upon the ground that the judgment of the court of common pleas was within its jurisdiction and was not contrary to law, and cause remanded to the court of appeals with direction to consider the weight of the evidence. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13145. JOHNSON *v.* JOHNSON ET AL. Decided May 20, 1913. ERROR to Circuit Court of Guernsey county. *Messrs. Rosemond & Bell*, for plaintiff in error. *Mr. Charles S. Turnbaugh* and *Mr. A. M. Morris*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13148. JOHNSTON, ADMR., *v.* THE CITY OF DAYTON. Decided May 20, 1913. ERROR to Circuit Court of Montgomery county. *Messrs. Mattern & Brumbaugh*, for plaintiff in error. *Mr. Frank S. Breene*; *Mr. A. J. Dwyer* and *Mr. John Roehm*, for defendant in error. Judg-

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ment of the circuit court reversed and that of the common pleas affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13153. THE SPRINGFIELD LIGHT, HEAT & POWER CO. *v.* THE CITY OF SPRINGFIELD. Decided May 20, 1913. ERROR to Circuit Court of Clark county. *Messrs. Hagan & Hagan; Mr. John L. Zimmerman* and *Messrs. Keifer & Keifer*, for plaintiff in error. *Mr. Elza F. McKee*, city solicitor, and *Mr. Stewart L. Tatum*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. JOHNSON, J., not participating.

No. 13159. REED ET AL., PARTNERS, *v.* FREET. Decided May 20, 1913. ERROR to Circuit Court of Allen county. *Mr. C. L. Fess*, for plaintiffs in error. *Mr. L. H. Rogers* and *Messrs. Wheeler & Bentley*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13160. THE MAHONING BUILDERS SUPPLY CO. *v.* CHESNEY. Decided May 20, 1913. ERROR to Circuit Court of Mahoning county. *Mr. D. J. Hartwell* and *Mr. Frank Jacobs*, for plaintiff in error. *Mr. E. N. Brown*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13167. *POWELL v. PARRISH*. Decided May 20, 1913. ERROR to Circuit Court of Franklin county. *Mr. G. J. Marriott*, for plaintiff in error. *Messrs. Earnhart & Bates*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13168. *DISSETTE v. MYERS, TREASURER*. Decided May 20, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Westenhaver, Boyd, Rudolph & Brooks*, for plaintiff in error. *Mr. John A. Cline*, prosecuting attorney, and *Mr. Walter D. Meals*, assistant prosecuting attorney, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13195. *HAWKINS v. MONTGOMERY ET AL.* Decided May 20, 1913. ERROR to Circuit Court of Licking county. *Messrs. Flory & Flory*, for plaintiff in error. *Messrs. Fitzgibbon & Montgomery*; *Mr. A. A. Stasel* and *Messrs. Norpell, Norpell & Martin*, for defendants in error. Judgment affirmed as to petition in error and modified as prayed for in cross-petition in error.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is, hereby affirmed as against said plaintiff in error and as to all matters presented by the petition in error.

And coming to consider the cross-petition in error of said Wesley Montgomery, it is considered

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and adjudged that said circuit court erred in finding that Nutter & Bourner, The Wilson Mill & Lumber Company, and The Superior Portland Cement Company, or either of them, had a lien upon said fund, and it is ordered and adjudged that they be excluded from participation therein.

SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13265. THE NORTHERN OHIO TRACTION & LIGHT CO. *v.* BATTIN, ADMX. Decided May 20, 1913. ERROR to Circuit Court of Stark county. *Messrs. Welty & Albaugh*, for plaintiff in error. *Mr. P. J. Collins* and *Messrs. Lynch & Day*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13277. JAMES *v.* SELDIN ET AL., PARTNERS AS J. SELDIN & SONS. Decided May 20, 1913. ERROR to Circuit Court of Lucas county. *Mr. Marion W. Bacome*, for plaintiff in error. *Mr. Lewis B. Hall* and *Mr. Edgar M. Flowers*, for defendants in error. Judgment reversed and judgment for plaintiff in error on authority of *Seeds Grain & Hay Co. v. Conger*, 83 Ohio St., 169. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13306. THE H. J. REEDY CO. *v.* HARRISON ET AL., EXRS. AND TRUSTEES. Decided May 20, 1913. ERROR to Circuit Court of Hamilton county.

Without Opinion.

Messrs. Healy, Ferris & McAvoy, for plaintiff in error. *Mr. Rufus B. Smith* and *Mr. Charles H. Stephens, Jr.*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13315. SHAINHOLTZ ET AL. *v.* THE CITY OF ZANESVILLE ET AL. Decided May 20, 1913. ERROR to Circuit Court of Muskingum county. *Mr. Stanley J. Crew* and *Mr. Robert J. King*, for plaintiffs in error. *Mr. T. F. Thompson*, city solicitor, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13316. GRAY *v.* AMERICAN CINTERING Co. Decided May 20, 1913. ERROR to Circuit Court of Trumbull county. *Messrs. Fillius & Fillius*, for plaintiff in error. *Messrs. Hine, Kennedy & Manchester* and *Mr. G. P. Gillmer*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13318. JACKSON ET AL. *v.* SHEPPARD, TRUSTEE. Decided May 20, 1913. ERROR to Circuit Court of Guernsey county. *Mr. J. W. Smallwood* and *Mr. J. B. Ferguson*, for plaintiffs in error. *Messrs. Rosemond & Bell* and *Mr. Charles S. Sheppard*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

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No. 13320. THE ARMOR CLAD MANUFACTURING Co. *v.* HEGGY. Decided May 20, 1913. ERROR to Circuit Court of Stark county. *Mr. J. A. Jeffers*, for plaintiff in error. *Mr. E. L. Mills*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13321. THE ARMOR CLAD MANUFACTURING Co. *v.* HEGGY. Decided May 20, 1913. ERROR to Circuit Court of Stark county. *Mr. J. A. Jeffers*, for plaintiff in error. *Mr. E. L. Mills*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13331. FRANK *v.* STAUDER ET AL. Decided May 20, 1913. ERROR to Circuit Court of Lorain county. *Mr. L. B. Fauver* and *Mr. R. H. Rice*, for plaintiff in error. *Messrs. Webber & Metcalf* and *Mr. Anthony Niedling*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13342. THE HAMILTON BUILDING Co. *v.* BEECHER. Decided May 20, 1913. ERROR to Circuit Court of Erie county. *Messrs. Guerin & Ritter*, for plaintiff in error. *Mr. R. B. Fisher*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13345. OSBORNE ET AL. *v.* THE AMHERST BANK Co. Decided May 20, 1913. ERROR to

Without Opinion.

Circuit Court of Cuyahoga county. *Mr. George A. Groot*, for plaintiffs in error. *Messrs. Myers & Green*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13348. GROSSNICKLE *v.* CARTER ET AL. Decided May 20, 1913. ERROR to Circuit Court of Clermont county. *Mr. T. P. Breeding; Mr. W. A. Joseph; Messrs. Frazier & Hicks; Messrs. Griffith & Nichols; Messrs. Eltzroth & Maple* and *Messrs. Darby & Benedict*, for plaintiff in error. *Messrs. W. F., Wm. A. & A. C. Roubush*, for defendants in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13352. THE SOUTHEASTERN OHIO RAILWAY, LIGHT & POWER CO. *v.* YOHO ET AL. Decided May 20, 1913. ERROR to Circuit Court of Muskingum county. *Mr. Edward R. Meyer*, for plaintiff in error. *Mr. Harry C. Shepherd* and *Mr. A. A. George*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13354. BARTLETT *v.* LAUDERBAUGH. Decided May 20, 1913. ERROR to Circuit Court of Knox county. *Messrs. Owen & Carr*, for plaintiff in error. *Mr. Columbus Ewalt*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

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No. 13450. THE CHICAGO & ERIE RAILROAD Co. v. FRY. Decided May 20, 1913. ERROR to Circuit Court of Allen county. *Mr. W. O. Johnson* and *Messrs. Halfhill, Quail & Kirk*, for plaintiff in error. *Messrs. Secrest & Everett*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13171. THE BELL GARMENT Co. v. THE UNITY SILK Co. Decided May 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. Fred Desberg*, for plaintiff in error. *Messrs. Weed, Miller & Rothenberg*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13172. W. C. TREECE & Co. v. THE MUTUAL MANUFACTURING Co. Decided May 27, 1913. ERROR to Circuit Court of Hancock county. *Mr. George H. Phelps*, for plaintiff in error. *Messrs. Burket & Burket* and *Mr. Carl D. Shoemaker*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13173. HASERODT, AUDITOR, ET AL. v. SUSAN. Decided May 27, 1913. ERROR to Circuit Court of Lorain county. *Mr. F. M. Stevens*, for plaintiffs in error. *Mr. G. B. Findlay*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

Without Opinion.

No. 13176. SEITZ *v.* WITZBERGER. Decided May 27, 1913. ERROR to Circuit Court of Summit county. *Messrs. Rogers & Rowley*, for plaintiff in error. *Mr. Clarence W. May* and *Mr. Andrew J. Wilhelm*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13181. THE CLEVELAND TRUST CO. *v.* THE VILLAGE OF OBERLIN ET AL. Decided May 27, 1913. ERROR to Circuit Court of Lorain county. *Mr. John MacGregor, Jr.*; *Mr. R. T. Sawyer* and *Mr. L. B. Fauver*, for plaintiff in error. *Mr. George L. Glitsch*; *Mr. G. A. Resek*; *Mr. F. A. Stetson*; *Mr. C. R. Summers*; *Mr. Charles A. Hammond* and *Mr. A. Z. Tillotson*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13183. HELLER *v.* KIPP ET AL. Decided May 27, 1913. ERROR to Circuit Court of Darke county. *Mr. Martin B. Trainor*, for plaintiff in error. *Mr. Elijah Devor* and *Mr. D. P. Irwin*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13186. LAMPH *v.* THE MAHONING VALLEY RY. Co. Decided May 27, 1913. ERROR to Circuit Court of Mahoning county. *Mr. George*

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Edwards, for plaintiff in error. *Messrs. Arrel, Wilson, Harrington & DeFord*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13193. MYERS *v.* BEELER ET AL. Decided May 27, 1913. ERROR to Circuit Court of Summit county. *Messrs. Musser, Kimber & Huffman*, for plaintiff in error. *Messrs. Wilcox, Parsons, Burch & Adams*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13198. THE FRANKLIN BANK CO. ET AL. *v.* MILLER, RECEIVER. Decided May 27, 1913. ERROR to Circuit Court of Licking county. *Mr. A. A. Stasel*, for plaintiffs in error. *Messrs. Jones & Jones* and *Mr. John M. Swartz*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13201. MILLER *v.* PYLE. Decided May 27, 1913. ERROR to Circuit Court of Hamilton county. *Mr. W. W. Symmes*, for plaintiff in error. *Mr. Carl S. Rankin* and *Messrs. Fulton & Woost*, for defendant in error. Judgment affirmed, the error in charge not being prejudicial. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13206. *MILLER v. KRIST*. Decided May 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. William H. Miller*, for plaintiff in error. *Mr. William T. Clark*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13208. *THE CITY OF CINCINNATI v. DUBRUL*. Decided May 27, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Edward M. Ballard* and *Mr. Geoffrey Goldsmith*, city solicitors, for plaintiff in error. *Mr. P. S. Phillips* and *Mr. A. W. Bruck*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13214. *GRIFFITH ET AL. v. KINGMAN*. Decided May 27, 1913. ERROR to Circuit Court of Morrow county. *Messrs. Mitchell & Bruce* and *Mr. J. W. Barry*, for plaintiffs in error. *Mr. S. C. Kingman*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

No. 13225. *FERRIMAN v. THE SAVINGS DEPOSIT BANK Co.* Decided May 27, 1913. ERROR to Circuit Court of Medina county. *Mr. Lee Elliott* and *Mr. J. W. Seymour*, for plaintiff in error. *Mr. Frank Spellman* and *Messrs. Henderson*,

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Quail & Siddall, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13229. THE FREE PRESS PUBLISHING CO. *v.* FRIES ET AL. Decided May 27, 1913. ERROR to Circuit Court of Wood county. *Mr. Edward Beverstock; Mr. Benjamin F. James; Mr. John S. Hoyman and Mr. Earl D. Bloom*, for plaintiff in error. *Mr. Jesse Stephens and Mr. Clyde R. Painter*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13230. RIDENOUR ET AL. *v.* FADLER ET AL. Decided May 27, 1913. ERROR to Circuit Court of Preble county. *Mr. R. E. Lowry and Messrs. Lowry & King*, for plaintiffs in error. *Messrs. Gilmore & Saylor*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13231. THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. *v.* McMECHEN. Decided May 27, 1913. ERROR to Circuit Court of Harrison county. *Messrs. Dunbar & Sweeney; Mr. A. O. Barnes and Mr. C. L. Weems*, for plaintiff in error. *Mr. R. H. Minter*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

Without Opinion.

No. 13349. *GROSSNICKLE v. CARTER ET AL.*
Decided May 27, 1913. ERROR to Circuit Court
of Clermont county. *Mr. T. P. Breeding; Mr. W.
A. Joseph; Messrs. Frazier & Hicks; Messrs.
Griffith & Nichols; Messrs. Eltzroth & Maple and
Mr. C. C. Benedict*, for plaintiff in error. *Messrs.
W. F., W. A. & A. C. Roudebush; Messrs. Grif-
fith & Nichols and Mr. T. P. Breeding*, for de-
fendants in error. Judgment affirmed. SHAUCK,
C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13365. *LEWIS ET AL. v. VAUGHN ET AL.*
Decided May 27, 1913. ERROR to Circuit Court
of Mahoning county. *Mr. H. A. Ernst and Mr.
Charles Koonce, Jr.*, for plaintiff in error. *Mr.
W. W. Pierson and Mr. M. C. McNab*, for de-
fendants in error. Judgment affirmed. SHAUCK,
C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13386. *HOFFMAN ET AL. v. STALEY ET AL.*
Decided May 27, 1913. ERROR to Circuit Court
of Hamilton county. *Messrs. Galvin & Bauer
and Messrs. Spangenberg & Spangenberg*, for
plaintiffs in error. *Messrs. Peck, Shaffer & Peck;
Messrs. Sayler & Sayler; Messrs. Dolle, Taylor
& O'Donnell and Messrs. Closs & Luebbert*, for
defendants in error. Judgment affirmed. JOHN-
SON, WANAMAKER and WILKIN, JJ., concur.

No. 13398. *HALEY v. KING ET AL., ADMXS.*
Decided May 27, 1913. ERROR to Circuit Court

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of Hamilton County. *Mr. S. O. Bayless* and *Messrs. Clore, Dickerson & Clayton*, for plaintiff in error. *Messrs. Kramer & Bettman* and *Mr. Joseph A. Keadin*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13399. *HALEY v. KING ET AL., ADMXS.* Decided May 27, 1913. ERROR to Circuit Court of Hamilton county. *Mr. S. O. Bayless* and *Messrs. Clore, Dickerson & Clayton*, for plaintiff in error. *Messrs. Kramer & Bettman* and *Mr. Joseph A. Keadin*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13926. *HERMANN v. THE STATE OF OHIO.* Decided May 27, 1913. ERROR to Circuit Court of Allen county. *Mr. Joseph P. Owens* and *Messrs. Armstrong, Light & Shappell*, for plaintiff in error. *Mr. J. J. Weadock*, prosecuting attorney; *Messrs. Welty & Downing*; *Mr. C. M. Earhart*; *Mr. J. A. White* and *Mr. W. B. Wheeler*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13955. *TOWNSEND v. THE STATE OF OHIO.* Decided May 27, 1913. ERROR to Circuit Court of Darke county. *Mr. J. M. Bickel*; *Mr. George W. Mannix, Jr.*, and *Mr. Martin B.*

Without Opinion.

Trainor, for plaintiff in error. *Mr. L. E. Kerlin* and *Mr. John F. Maher*, prosecuting attorneys; *Mr. D. W. Bowman* and *Mr. A. H. Meeker*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14007. THE STATE OF OHIO *v.* HERMANN. Decided May 27, 1913. ERROR to Circuit Court of Allen county. *Mr. J. J. Weadock*, prosecuting attorney; *Messrs. Welty & Downing*; *Mr. C. M. Earhart*; *Mr. J. A. White* and *Mr. W. B. Wheeler*, for plaintiff in error. *Messrs. Armstrong, Light & Shappell*; *Mr. Joseph P. Owens*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14021. THE CINCINNATI TRACTION CO. *v.* PERRY. Decided May 27, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Kinhead & Rogers*, for plaintiff in error. *Mr. Charles W. Baker*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13212. LAUGHLIN *v.* SPENCE ET AL. Decided June 3, 1913. ERROR to Circuit Court of Guernsey county. *Messrs. Rosemond, Bell & Dugan*, for plaintiff in error. *Messrs. Sheppard & Eagleson*, for defendants in error. Judgment of the circuit court reversed and that of the com-

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mon pleas affirmed. SHAUCK, C. J., WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13238. THE TOLEDO & OHIO CENTRAL RY. Co. *v.* GILMAN. Decided June 3, 1913. ERROR to Circuit Court of Morrow county. *Messrs. Doyle & Lewis* and *Mr. Benjamin Olds*, for plaintiff in error. *Messrs. Harlan & Wood*, for defendants in error. Judgment reversed and judgment for plaintiff in error. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13239. CAMPBELL *v.* THE STATE, EX REL. CAIN. Decided June 3, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Kelley, Huseman & Remke*, for plaintiff in error. *Mr. Joseph T. Harrison*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13243. STARK *v.* STARK. Decided June 3, 1913. ERROR to Circuit Court of Richland county. *Mr. Jesse E. LaDow*, for plaintiff in error. *Messrs. Douglass & Hutchison*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13334. SMITH *v.* THE PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS RY. Co. Decided June 3, 1913. ERROR to Circuit Court of Coshoc-

Without Opinion.

ton county. *Messrs. W. S. Anderson & Son* and *Messrs. Levengood & Johnson*, for plaintiff in error. *Mr. C. L. Weems* and *Mr. F. E. Pomerene*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

No. 13363. THE BOARD OF COUNTY COMMISSIONERS OF GUERNSEY COUNTY *v.* BLACK. Decided June 3, 1913. ERROR to Circuit Court of Guernsey county. *Mr. B. F. Enos*, prosecuting attorney, and *Messrs. Sheppard & Eagleson*, for plaintiff in error. *Mr. John S. Black*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13378. DUNCAN, EXR., *v.* McDONOUGH ET AL. Decided June 3, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Moulinier, Bettman & Hunt*, for plaintiff in error. *Mr. W. A. Rinckhoff* and *Messrs. Clore, Dickerson & Clayton*, for defendants in error. Judgment reversed and judgment for plaintiff in error. SHAUCK, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13387. THE PORTSMOUTH STREET RAILROAD & LIGHT CO. *v.* FOY, SR., ET AL., PARTNERS. Decided June 3, 1913. ERROR to Circuit Court of

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Scioto county. *Messrs. Milner, Miller & Searl*, for plaintiff in error. *Messrs. Evans & Crawford*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13408. CROSSLEY ET AL. *v.* HAMMOND ET AL. Decided June 3, 1913. ERROR to Circuit Court of Ottawa county. *Mr. Timothy S. Hogan*, attorney general; *Mr. Charles S. Northup* and *Mr. George N. Fell*, for plaintiffs in error. *Mr. George A. True* and *Mr. Ruel H. Crawford*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13413. BOARD OF EDUCATION OF ELIZABETH TOWNSHIP *v.* BOARD OF EDUCATION OF DECATUR TOWNSHIP. Decided June 3, 1913. ERROR to Circuit Court of Lawrence county. *Messrs. Andrews & Irish* and *Mr. Julius L. Anderson*, for plaintiff in error. *Mr. A. R. Johnson* and *Mr. Dan C. Jones*, for defendant in error. Judgment affirmed. SHAUCK, C. J., NEWMAN and WILKIN, JJ., concur.

No. 13415. LAKE ERIE & WESTERN RD. CO. *v.* THE FOSTORIA & FREMONT RY. CO. Decided June 3, 1913. ERROR to Circuit Court of Seneca county. *Mr. John B. Cockrum*; *Messrs. Dore & Dore* and *Mr. James G. Hunt*, for plaintiff in error. *Messrs. Goeke, Anderson & Musser* and

Without Opinion.

Mr. Charles A. Strauch, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13422. MILLER ET AL. *v.* SMITH. Decided June 3, 1913. ERROR to Circuit Court of Seneca county. *Mr. W. D. Pence* and *Mr. Willis Bacon*, for plaintiffs in error. *Messrs. Wagner & Knepper*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13430. WHITE ET AL. *v.* WHITE ET AL. Decided June 3, 1913. ERROR to Circuit Court of Wood county. *Mr. Edgar H. Johnson* and *Mr. Eugene Rhinefrank*, for plaintiffs in error. *Mr. J. W. Lane*, for Rose White, defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13433. WARNOCK *v.* WILKINSON ET AL. Decided June 3, 1913. ERROR to Circuit Court of Belmont county. *Mr. Harry C. Shepherd*, for plaintiff in error. *Mr. Fred Spriggs*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13434. WARNOCK *v.* PORTERFIELD. Decided June 3, 1913. ERROR to Circuit Court of Belmont county. *Mr. Harry C. Shepherd*, for plaintiff in error. *Mr. Fred Spriggs*, for defend-

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ant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13435. WARNOCK *v.* OGILBEE. Decided June 3, 1913. ERROR to Circuit Court of Belmont county. *Mr. Harry C. Shepherd*, for plaintiff in error. *Mr. Fred Spriggs*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13436. THE LIMA LOCOMOTIVE & MACHINE CO. *v.* THE CINCINNATI, HAMILTON & DAYTON RY. CO. Decided June 3, 1913. ERROR to Circuit Court of Allen county. *Messrs. Prophet & Eastman* and *Messrs. Barr & Jackson*, for plaintiff in error. *Mr. Morison R. Waite* and *Mr. I. R. Longworth*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13439. N. M. URI & CO. *v.* SCHULER, ASSIGNEE. Decided June 3, 1913. ERROR to Circuit Court of Crawford county. *Messrs. Leuthold, McCarron & Leuthold*, for plaintiff in error. *Mr. H. R. Schuler*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13908. THE STATE, EX REL. FRENCH, *v.* CLOUGH. Decided June 3, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Wing*,

Without Opinion.

Myler & Turney, for plaintiff in error. *Messrs. Smith, Taft & Arter*, for defendant in error. Judgment affirmed. SHAUCK, C. J., NEWMAN and WILKIN, JJ., concur.

No. 13157. JONES ET AL. v. JONES BROTHERS. Decided June 10, 1913. ERROR to Circuit Court of Knox county. *Mr. J. M. McGillivray; Messrs. Waight & Moore* and *Mr. W. Z. Davis*, for plaintiff in error. *Mr. Frank W. Owen* and *Mr. Ferdinand Jelke, Jr.*, for defendant in error. On rehearing. Judgment modified as shown in journal entry.

The application of plaintiff in error for a rehearing herein having heretofore been allowed, this cause came on again to be heard upon the transcript of the record of the circuit court of Knox county, and was argued by counsel. On consideration whereof, it is ordered that the former entry herein, made March 28, 1913, be vacated and set aside, and this court finds that the circuit court erred in finding, that the clause, "no monetary allowance shall be made for any delays of whatever character" (which was included in the contract between the parties), should be eliminated, and in ordering that the cause be remanded to the court of common pleas for trial to a jury, to hear and determine the injury and loss to plaintiffs caused by reason of defendants not having the entire right of way over said proposed line at the time of beginning said work on or about November 6, 1905, and thereafter, and to fix

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and assess any damages therefor according to law.

It is, therefore, ordered and adjudged that the judgment of the circuit court be, and the same is hereby, modified by striking therefrom as much thereof as is included in the finding and orders above set forth, and in all other respects the said judgment of the circuit court is hereby affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13166. THE MAHONING VALLEY RY. CO. *v.* CONNORS. Decided June 10, 1913. ERROR to Circuit Court of Mahoning county. *Messrs. Arrel, Wilson, Harrington & DeFord*, for plaintiff in error. *Mr. S. D. L. Jackson* and *Mr. J. V. Murphy*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13249. MOORE *v.* MOORE ET AL. Decided June 10, 1913. ERROR to Circuit Court of Sandusky county. *Mr. W. W. Campbell* and *Mr. J. B. Stahl*, for plaintiff in error. *Messrs. Kinney, O'Farrell & Rimelspach* and *Mr. J. M. Sheets*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13250. YEOMAN *v.* KUESTER. Decided June 10, 1913. ERROR to Circuit Court of Morrow

Without Opinion.

county. *Mr. S. C. Kingman* and *Messrs. Harlan & Wood*, for plaintiff in error. *Mr. Harry C. Miller*; *Mr. J. W. Barry* and *Mr. T. B. Mateer*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13255. THE FARMERS MUTUAL FIRE INSURANCE ASSN. *v.* BAKER. Decided June 10, 1913. ERROR to Circuit Court of Butler county. *Messrs. Brennan & Stauter* and *Messrs. Jones & Routzohn*, for plaintiff in error. *Mr. Isaac Baker* and *Mr. Walton S. Bowers*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13257. YURJEVIC *v.* VUKELIC. Decided June 10, 1913. ERROR to Circuit Court of Jefferson county. *Mr. W. C. Brown*, for plaintiff in error. *Messrs. Erskine & Smith*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13261. THE LANCASTER LEATHER CO. *v.* CARPENTER. Decided June 10, 1913. ERROR to Circuit Court of Fairfield county. *Mr. C. W. McCleery*, for plaintiff in error. *Mr. W. K. Martin* and *Mr. M. A. Daugherty*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

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No. 13262. *BRAYTON v. GALBRONER ET AL.* Decided June 10, 1913. ERROR to Circuit Court of Seneca county. *Mr. George E. Schroth*, for plaintiff in error. *Mr. Milton Saylor and Messrs. Platt & Black*, for defendants in error. Judgment affirmed. *JOHNSON, DONAHUE and WANAMAKER, JJ.*, concur.

No. 13401. *CLAAR ET AL. v. THE CITIZENS SAVINGS & TRUST CO. ET AL.* Decided June 10, 1913. ERROR to Circuit Court of Perry county. *Mr. C. W. McCleery and Mr. R. U. Wilson*, for plaintiffs in error. *Mr. J. M. McGillivray; Mr. D. H. Armstrong and Mr. C. A. Donahue*, for defendants in error. Judgment affirmed. Grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same is hereby, affirmed; for the reason that the errors in the charge of the court of common pleas to the jury are not found by this court to have been prejudicial, this court finding that substantial justice has been done between the parties. *JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ.*, concur.

No. 13407. *CURTISS ET AL. v. THE CHARTIERS OIL Co.* Decided June 10, 1913. ERROR to Circuit Court of Perry county. *Messrs. Booth, Keating, Peters & Pomerene*, for plaintiffs in error. *Mr. D. N. Postlewaite; Mr. T. P. Linn; Mr. A. L. Thurman; Mr. C. A. Donahue and Messrs.*

Without Opinion.

Weil & Thorp, for defendant in error. Judgment affirmed. SHAUCK, C. J., NEWMAN and WILKIN, JJ., concur.

No. 13732. THE CITY OF SALEM *v.* WRIGHT. Decided June 10, 1913. ERROR to Circuit Court of Columbiana county. *Mr. S. W. Ramsey* and *Mr. John E. Scott*, for plaintiff in error. *Messrs. Metzger & Smith* and *Mr. W. S. Anderson*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 13764. WISE, A TAXPAYER, *v.* THE CITY OF BARBERTON ET AL. Decided June 10, 1913. ERROR to Circuit Court of Summit county. *Mr. O. D. Everhard* and *Mr. W. E. Young*, for plaintiff in error. *Mr. Elmer Boden*, city solicitor, and *Messrs. Rogers, Rowley & Mather*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., not participating.

No. 13866. MASON *v.* THE STATE OF OHIO. Decided June 10, 1913. ERROR to Circuit Court of Montgomery county. *Messrs. Mattern & Brumbaugh* and *Mr. W. Z. Davis*, for plaintiff in error. *Mr. Robert C. Patterson*, prosecuting attorney, and *Mr. Robert R. Nevin*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

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No. 13182. BROWN, TRUSTEE, *v.* HESTER. Decided June 17, 1913. ERROR to Circuit Court of Huron county. *Mr. Sherman Kulp* and *Mr. A. V. Andrews*, for plaintiff in error. *Mr. A. M. Beattie* and *Messrs. C. P. & R. D. Wickham*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13189. THE TOLEDO, BOWLING GREEN & SOUTHERN TRACTION CO. *v.* BAXTER. Decided June 17, 1913. ERROR to Circuit Court of Hancock county. *Mr. E. V. Bope*, for plaintiff in error. *Mr. George H. Phelps*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13269. TOWNSEND *v.* HEILKER ET AL. Decided June 17, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Walter M. Locke*, for plaintiff in error. *Messrs. Galvin & Bauer*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13270. POLAND ET AL., TAX COMMISSIONERS OF OHIO, *v.* THE CINCINNATI, GEORGETOWN & PORTSMOUTH RD. CO. Decided June 17, 1913. ERROR to Circuit Court of Franklin county. *Mr. Timothy S. Hogan*, attorney general; *Mr. Clar-*

Without Opinion.

ence *D. Laylin* and *Mr. J. M. McGillivray*, for plaintiffs in error. *Messrs. Dinsmore & Shohl*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13271. POLAND ET AL., TAX COMMISSIONERS OF OHIO *v.* THE FELICITY & BETHEL RD. CO. Decided June 17, 1913. ERROR to Circuit Court of Franklin county. *Mr. Timothy S. Hogan*, attorney general; *Mr. Clarence D. Laylin* and *Mr. J. M. McGillivray*, for plaintiffs in error. *Messrs. Dinsmore & Shohl*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13275. THE COLUMBUS MUTUAL LIFE INSURANCE CO. *v.* FORD. Decided June 17, 1913. ERROR to Circuit Court of Geauga county. *Mr. Robert S. Parks* and *Messrs. Sheets, West & Game*, for plaintiff in error. *Mr. Jay Buchwalter*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13281. MEREDITH ET AL., COMMISSIONERS, ET AL. *v.* LANDON, ETC. Decided June 17, 1913. ERROR to Circuit Court of Delaware county. *Mr. E. R. Williams*, prosecuting attorney, and *Messrs. Jewell & Benton*, for plaintiffs in error. *Messrs. Marriott, Freshwater & Bliss* and *Messrs.*

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Overturf & Hough, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13286. *HUGHES v. THE JOHNSTOWN & CROTON TELEPHONE CO.* Decided June 17, 1913. ERROR to Circuit Court of Licking county. *Messrs. Fitzgibbon & Montgomery*, for plaintiff in error. *Messrs. Kibler & Kibler*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13287. *GREEN v. BALL.* Decided June 17, 1913. ERROR to Circuit Court of Ashtabula county. *Mr. Allen M. Cox* and *Mr. Stillman F. Kneeland*, for plaintiff in error. *Messrs. McGiffert & Ullman*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13307. *THE AKRON & CHICAGO JUNCTION RD. CO. v. WEEDMAN, EXR.* Decided June 17, 1913. ERROR to Circuit Court of Huron county. *Messrs. Arrel, Wilson, Harrington & DeFord* and *Mr. D. W. Severance*, for plaintiff in error. *Mr. E. M. Palmer* and *Messrs. C. P. & R. D. Wickham*, for defendant in error. Judgment reversed and judgment for plaintiff in error. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur. WANAMAKER, J., dissents.

Without Opinion.

No. 13447. *ALEXANDER ET AL. v. KEYS ET AL.* Decided June 17, 1913. ERROR to Circuit Court of Belmont county. *Mr. J. M. Lessick; Mr. Albert W. Kennon; Mr. Newell K. Kennon and Mr. G. C. Kinder*, for plaintiffs in error. *Messrs. Mitchell & Mitchell and Mr. C. L. Weems*, for defendants in error. Judgment affirmed. *JOHNSON, WANAMAKER and WILKIN, JJ.*, concur.

No. 13593. *HILL, ADMX., v. PERE MARQUETTE RD. CO.* Decided June 17, 1913. ERROR to Circuit Court of Lucas county. *Mr. Orville S. Brumback*, for plaintiff in error. *Mr. Julian H. Tyler*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ.*, concur. *WANAMAKER, J.*, dissents.

No. 13679. *HUNT v. THE STATE OF OHIO.* Decided June 17, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Kerruish, Kerruish, Hartshorn & Spooner*, for plaintiff in error. *Mr. Timothy S. Hogan*, attorney general; *Mr. B. S. Johnson; Mr. J. J. Babka and Mr. Robert M. Morgan*, for defendant in error. Judgment affirmed. *SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ.*, concur.

No. 13689. *THE PUBLIC SERVICE COMMISSION OF OHIO v. THE BALTIMORE & OHIO RD. CO.* Decided June 17, 1913. ERROR to Circuit

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Court of Franklin county. *Mr. Timothy S. Hogan*, attorney general; *Mr. C. C. Marshall* and *Messrs. Crum, Raymund & Hedges*, for plaintiff in error. *Mr. F. A. Durban* and *Mr. Robert J. King*, for defendant in error. Judgment modified so as to permit the defendant in error to require shippers to load at non-agency but not at agency stations. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13864. SCHMIDT, A MINOR, ETC., *v.* THE CINCINNATI TRACTION Co. Decided June 17, 1913. ERROR to Circuit Court of Hamilton county. *Mr. William H. Schweikert*; *Mr. George J. Slaline* and *Mr. Stanley Matthews*, for plaintiff in error. *Mr. Joseph Wilby* and *Mr. R. E. Simmonds, Jr.*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13885. THE STATE OF OHIO *v.* WOOLEY. Decided June 17, 1913. ERROR to Circuit Court of Hardin county. *Mr. J. R. Stillings* and *Mr. Kent P. Johnson*, prosecuting attorneys, and *Mr. T. C. Mahon*, for plaintiff in error. *Messrs. Stickle & Cessna*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13927. THE YOUNGSTOWN WIRE & IRON Co. *v.* SCOTT. Decided June 17, 1913. ERROR to Circuit Court of Mahoning county. *Messrs. Seaton & Paine* and *Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews*, for plaintiff in error. *Mr. D. F. Anderson*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13935. THE BOARD OF COUNTY COMMISSIONERS OF CLERMONT COUNTY *v.* JUDD. Decided June 17, 1913. ERROR to Circuit Court of Clermont county. *Mr. Daniel W. Murphy*, for plaintiff in error. *Mr. Charles C. Kearns* and *Mr. Eli H. Speidel*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE and NEWMAN, JJ., concur.

No. 14241. IN RE GILBERT A. BARTHOLOMEW ON BEHALF OF RAYMOND ADAM BARTHOLOMEW, A MINOR. Decided June 19, 1913. Petition for Writ of *Habeas Corpus*. *Messrs. J. R. & H. R. Snyder* and *Mr. George S. Long*, for petitioners.

Writ refused on the ground that it appears from the application that Raymond Adam Bartholomew is in the custody of the St. Joseph Seminary pursuant to an order of the court of appeals which court had jurisdiction to make the order placing him in said institution and that the order which it made in that behalf is not void.

No. 13262. BRAYTON *v.* GALBRONER ET AL. Decided June 24, 1913. ERROR to Circuit Court

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of Seneca county. *Mr. George E. Schroth*, for plaintiff in error. *Mr. Milton Sayler and Messrs. Platt & Black*, for defendants in error. Judgment reversed and cause remanded to the common pleas court for trial upon the issues joined. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13289. *JEFFREY v. BATES, ADMR.* Decided June 24, 1913. ERROR to Circuit Court of Franklin county. *Messrs. Arnold & Game*, for plaintiff in error. *Mr. M. B. Earnhart*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13290. *SNYDER v. FEARER ET AL.* Decided June 24, 1913. ERROR to Circuit Court of Crawford county. *Mr. W. J. Geer*, for plaintiff in error. *Mr. L. C. Barker*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE and WANAMAKER, JJ., concur.

No. 13297. *BUSHNELL ET AL., TRUSTEES, v. GABRIEL, COUNTY TREASURER.* Decided June 24, 1913. ERROR to Circuit Court of Hocking county. *Mr. Edward Bushnell*, for plaintiffs in error. *Mr. H. E. Sparnon*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13616. KEVERN ET AL. *v.* THIBODEAU. Decided June 24, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Kerruish, Kerruish, Hartshorn & Spooner*, for plaintiffs in error. *Mr. Harry C. Gahn*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13759. LAMKIN *v.* ROBINSON ET AL. Decided June 24, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Healy, Ferris & McAvoy* and *Mr. C. J. McDiarmid*, for plaintiff in error. *Messrs. Stephens, Lincoln & Stephens* and *Mr. Charles M. Leslie*, for defendant in error. Judgment affirmed. DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13760. STEVENS *v.* ROBINSON ET AL. Decided June 24, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Healy, Ferris & McAvoy* and *Mr. C. J. McDiarmid*, for plaintiff in error. *Messrs. Stephens, Lincoln & Stephens* and *Mr. Charles M. Leslie*, for defendants in error. Judgment affirmed. DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13869. THE STATE, EX REL. VOORHEES ET AL., *v.* CASSINGHAM, MAYOR, ET AL. Decided June 24, 1913. ERROR to Circuit Court of Coshocton county. *Mr. Burt F. Voorhees; Mr. Thomas E. Duncan* and *Mr. James Glenn*, for plaintiff in error. *Mr. John C. Adams*, city so-

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licitor, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13905. ALBERY *v.* SESSIONS, ADMR. Decided June 24, 1913. ERROR to Circuit Court of Franklin county. *Mr. E. L. DeWitt*, for plaintiff in error. *Mr. J. M. Sheets* and *Messrs. Ricketts & Cope*, for defendant in error. Judgment affirmed. JOHNSON. WANAMAKER and WILKIN, JJ., concur.

No. 13915. THE FELICITY & BETHEL RD. CO. *v.* HARVEY, ADMR. Decided June 24, 1913. ERROR to Circuit Court of Clermont county. *Messrs. Dinsmore & Shohl*, for plaintiff in error. *Messrs. Griffith & Nichols*; *Mr. C. C. Kearns* and *Mr. Eli H. Speidel*, for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13923. THE CITY OF DAYTON ET AL *v.* STALEY, A TAXPAYER. Decided June 24, 1913. ERROR to Circuit Court of Montgomery county. *Mr. Frank S. Breene*, city solicitor; *Mr. Carl L. Bauman* and *Messrs. McKemy & Cline*, for plaintiffs in error. *Messrs. McConnaughey & Shea* and *Messrs. Gottschall & Turner*, for defendant in error. Judgment of the circuit court reversed and judgment for plaintiffs in error. SHAUCK, C. J., JOHNSON, WANAMAKER and WILKIN, JJ., concur.

Without Opinion.

No. 13938. THE VILLAGE OF WILLIAMSBURG v. WILSON. Decided June 24, 1913. ERROR to Circuit Court of Clermont county. *Mr. H. L. Britton; Messrs. Nichols & Nichols and Messrs. Griffith & Nichols*, for plaintiff in error. *Mr. Charles C. Kearns and Mr. Eli H. Speidel*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13184. WARNER, ADMR., v. PHILLIPS ET AL. Decided June 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Stearns, Chamberlain & Royon and Mr. D. C. Westenhaver*, for plaintiff in error. *Mr. John J. Sullivan; Messrs. Gott & Locher; Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews; Messrs. White & Crosser; Messrs. Kline, Tolles & Morley; Mr. E. Jay Pinney and Mr. A. E. Clevenger*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13185. WARNER, ADMR., v. PHILLIPS ET AL. Decided June 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Stearns, Chamberlain & Royon and Mr. D. C. Westenhaver*, for plaintiff in error. *Mr. John J. Sullivan; Messrs. Gott & Locher; Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews; Messrs. White & Crosser; Messrs. Kline, Tolles & Morley; Mr. E. Jay Pinney and Mr. A. E. Clevenger*, for de-

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endants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13242. THE NATIONAL COMMISSION CO. *v.* THE CITIZENS SAVINGS BANK OF UPPER SANDUSKY. Decided June 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. T. F. Quigley* and *Mr. Howard A. Couse*, for plaintiff in error. *Messrs. Carpenter, Young & Stocker* and *Mr. H. H. Newell*, for defendant in error. Judgment affirmed. SHAUCK, C. J., DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13304. BIRDSILL *v.* LACEY. Decided June 27, 1913. ERROR to Circuit Court of Portage county. *Messrs. White, Johnson & Cannon*, for plaintiff in error. *Messrs. Smart, Marvin & Ford*, for defendant in error. Judgment affirmed. JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13309. TRUAX *v.* CORFMAN. Decided June 27, 1913. ERROR to Circuit Court of Wyandot county. *Messrs. Platt & Black* and *Messrs. Newell & Bowers*, for plaintiff in error. *Messrs. Meck & Stalter*, for defendant in error. Judgment reversed and judgment for plaintiff in error. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

Without Opinion.

No. 13324. *THE ORWELL BANKING CO. v. PELTON ET AL.* Decided June 27, 1912. ERROR to Circuit Court of Ashtabula county. *Messrs. McGiffert & Ullman*, for plaintiff in error. *Mr. Warren Thomas; Mr. H. E. Starkey and Messrs. Perry & Hitchcock*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13328. *LOOMIS v. THE CLINTON COAL & MINING CO. ET AL.* Decided June 27, 1913. ERROR to Circuit Court of Guernsey county. *Mr. Robert T. Scott*, for plaintiff in error. *Mr. J. H. Mackey and Mr. G. D. Dugan*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13329. *BOYER ET AL., EXRS., ET AL. v. BOYER.* Decided June 27, 1913. ERROR to Circuit Court of Fairfield county. *Mr. M. A. Daugherty; Mr. W. H. Lane; Mr. Eugene Moore and Mr. C. O. Beals*, for plaintiffs in error. *Mr. William Davidson and Mr. C. W. McCleery*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13339. *THE BOARD OF COUNTY COMMISSIONERS OF FRANKLIN COUNTY v. THE STATE, EX REL. THRAILKILL.* Decided June 27, 1913.

Cases Reported.

ERROR to Circuit Court of Franklin county. *Messrs. Turner & Sherman*, for plaintiff in error. *Mr. M. E. Thrailkill*, for defendant in error. Judgment reversed and judgment of the court of common pleas affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13344. *HOFFSIS ET AL. v. SHEALEY ET AL.* Decided June 27, 1913. ERROR to Circuit Court of Crawford county. *Messrs. Leuthold, McCarron & Leuthold* and *Mr. C. H. Henkel*, for plaintiffs in error. *Messrs. Finley & Gallinger*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13584. *THE NATIONAL ENDOWMENT CO. v. FROST.* Decided June 27, 1913. ERROR to Circuit Court of Hamilton county. *Mr. C. B. Matthews*, for plaintiff in error. *Mr. Robert B. Simmons; Mr. John C. Hermann* and *Mr. Constant Southworth*, for defendant in error. Judgment affirmed by consent.

No. 13952. *THE STATE OF OHIO v. THE COSHOCTON GAS CO.* Decided June 27, 1913. ERROR to Circuit Court of Franklin county. *Mr. Timothy S. Hogan*, attorney general, and *Mr. Clarence D. Laylin*, for plaintiff in error. *Mr. F. E. Pomerene* and *Mr. S. M. Douglass*,

Without Opinion.

for defendant in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13982. WILBERDING, ADMR., *v.* MILLER ET AL. Decided June 27, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Higley & Maurer*, for plaintiff in error. *Messrs. Stearns, Chamberlain & Royon; Messrs. McArthur & Dunnebach; Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews; Messrs. Westenhaver, Boyd, Rudolph & Brooks; Messrs. Henderson, Quail & Siddall; Messrs. Higley & Maurer and Mr. Bishop H. Schriber*, for defendants in error. Judgment modified as shown in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, modified in the following respect:

That said circuit court should have found and adjudged that the portion received by the said trustees of the amount of three hundred thousand dollars, shown in the item for 1905 as "transferred contingent capital" in Wilberding's exhibit I, page 412 of the record, and the amount of \$62,521.05, shown in the item for 1905 as "balance to credit profit and loss account," in the same exhibit I, should be treated and charged as income and distributed accordingly;

It is hereby ordered and adjudged that the judgment and decree of the said circuit court be and the same is hereby ordered to be modified in that respect;

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It is further ordered and adjudged that the said judgment of the circuit court in all other respects be and the same is hereby affirmed.

SHAUCK, C. J., JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

For opinion, see 90 Ohio State.—REPORTER.

No. 14059. SCHLAGEL ET AL. *v.* SPAULDING, COUNTY AUDITOR, ET AL. Decided June 27, 1913. ERROR to Court of Appeals of Marion county. *Mr. John H. Clark and Mr. W. Z. Davis*, for plaintiffs in error. *Messrs. Crissinger & Guthery; Mr. Charles L. Justice and Mr. Homer E. Johnson*, for defendants in error. Judgment affirmed. WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14226. HUNTINGTON *v.* PERKINS ET AL., TRUSTEES, ET AL. Decided June 27, 1913. ERROR to Court of Appeals of Cuyahoga county. *Mr. James W. Stewart and Messrs. White, Johnson & Cannon*, for plaintiffs in error. *Messrs. Squire, Sanders & Dempsey and Mr. Charles T. Brooks*, for defendants in error. Judgment affirmed. SHAUCK, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 12713. SNOWBERGER ET AL. *v.* SNOWBERGER. Decided September 23, 1913. ERROR to Circuit Court of Miami county. *Mr. J. A. Davy*, for plaintiffs in error. *Mr. J. H. Marlin and Mr. Thomas B. Kyle*, for defendant in error. On

Without Opinion.

rehearing. Judgment setting aside the election of the defendant in error affirmed. Judgment ordering partition reversed, upon the ground that by uncontradicted evidence the plaintiffs in error were not tenants in common with each other, and petition for partition dismissed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13346. THE TIFFIN ART METAL CO. *v.* THE TIFFIN CONSOLIDATED TELEPHONE CO. Decided September 23, 1913. ERROR to Circuit Court of Seneca county. *Mr. Alexander Kiskadden*, for plaintiff in error. *Messrs. Royer & Spittler*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13355. HARKNESS *v.* KINCHELOE. Decided September 23, 1913. ERROR to Circuit Court of Muskingum county. *Messrs. Owen & Carr*, for plaintiff in error. *Mr. Harry C. Shepherd*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13362. WILE ET AL. *v.* FETTERMAN ET AL. Decided September 23, 1913. ERROR to Circuit Court of Ashtabula county. *Mr. S. L. Clark*, for plaintiffs in error. *Mr. F. J. Bishop* and *Messrs. Perry & Hitchcock*, for defendants in error.

Cases Reported

Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13368. LAMBERT *v.* THE CITY OF CLEVELAND. Decided September 23, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Wing, Myler & Turney* and *Mr. John M. Pindras*, for plaintiff in error. *Mr. E. K. Wilcox*, city solicitor, and *Mr. Joseph C. Hostetler*, assistant city solicitor, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13369. TURNEY ET AL. *v.* MYERS, TREASURER. Decided September 23, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Wing, Myler & Turney*, for plaintiffs in error. *Mr. John A. Cline*, prosecuting attorney; *Mr. Walter D. Meals*, assistant prosecuting attorney; *Mr. E. K. Wilcox*, city solicitor, and *Mr. Frank E. Stevens*, assistant city solicitor, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13372. WILLARD *v.* FOX. Decided September 23, 1913. ERROR to Circuit Court of Ashland county. *Messrs. McCray & McCray*, for plaintiff in error. *Messrs. Mykrantz & Patterson*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13377. THE BELLEFONTAINE FEED & FUEL CO. *v.* ROGERS, GUARDIAN. Decided September 23, 1913. ERROR to Circuit Court of Logan county. *Messrs. West & Chamberlin*, for plaintiff in error. *Mr. M. G. Bell*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13394. PHIFER ET AL. *v.* MONTGOMERY ET AL., BOARD OF COUNTY COMMISSIONERS OF HANCOCK COUNTY ET AL. Decided September 23, 1913. ERROR to Circuit Court of Hancock county. *Mr. George H. Phelps*, for plaintiffs in error. *Mr. Charles A. Blackford*, prosecuting attorney, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13396. MCARTHUR ET AL. *v.* GREENTREE ET AL. Decided September 23, 1913. ERROR to Circuit Court of Hardin county. *Messrs. Johnson & Johnson* and *Messrs. Smick & Hoge*, for plaintiffs in error. *Messrs. Stickle & Cessna* and *Mr. T. C. Mahon*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13397. PREUSSER *v.* THE BEACON JOURNAL Co. Decided September 23, 1913. ERROR to Circuit Court of Summit county. *Mr. J. M.*

Cases Reported

Poulson and *Mr. H. Preusser*, for plaintiff in error. *Messrs. Rogers, Rowley & Mather*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13400. *MILLIKIN v. TIDD*. Decided September 23, 1913. ERROR to Circuit Court of Trumbull county. *Mr. A. L. Phelps*, for plaintiff in error. *Mr. Jay Buchwalter*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13410. *ROBISON, EXR., v. BOWLER*. Decided September 23, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. T. H. Johnson* and *Mr. William Howell*, for plaintiff in error. *Messrs. A. A. & A. H. Bemis*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13411. *HINE ET AL., PARTNERS, v. BLANCHFIELD, AN INFANT, BY ETC.* Decided September 23, 1913. ERROR to Circuit Court of Portage county. *Messrs. Reed & Eichelberger*, for plaintiffs in error. *Messrs. R. S. & R. J. Webb*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13414. *THE OHIO FUEL SUPPLY CO. v. WEAKLEY*. Decided September 23, 1913. ERROR to Circuit Court of Fairfield county. *Mr. L. B. Denning* and *Mr. L. G. Silbaugh*, for plaintiff in error. *Mr. M. A. Daugherty*, for defendant in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13419. *LEWIS v. LEWIS*. Decided September 23, 1913. ERROR to Circuit Court of Richland county. *Mr. Jesse E. LaDow*, for plaintiff in error. *Mr. Harry T. Manner* and *Messrs. Cummings, McBride & Wolfe*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13423. *THE SCHORNDORFER & EBERHARD CO. v. THE SOLAR PRISM CO.* Decided September 23, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Wing, Myler & Turney*, for plaintiff in error. *Messrs. Peskind & Perris*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13432. *ROLOFF v. KERR ET AL.* Decided September 23, 1913. ERROR to Circuit Court of Mahoning county. *Messrs. Schlarb & Carman*, for plaintiff in error. *Messrs. Burky & Burky*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13437. NAVE *v.* THE BOARD OF EDUCATION OF GREEN TOWNSHIP SCHOOL DISTRICT. Decided September 23, 1913. ERROR to Circuit Court of Clark county. *Mr. Clem V. Collins* and *Mr. C. S. Olinger*, for plaintiff in error. *Mr. Lawrence E. Laybourne*, for defendant in error. Judgment affirmed. DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13444. THE NORTHERN REALTY CO. *v.* THE CUYAHOGA RIVER POWER CO. Decided September 23, 1913. ERROR to Circuit Court of Summit county. *Messrs. Rogers, Rowley & Mather*, for plaintiff in error. *Messrs. Westenhaver, Boyd, Rudolph & Brooks* and *Messrs. Frank & Ream*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13445. KIMBER, ADMR., *v.* JAYNES, EXR., ET AL. Decided September 23, 1913. ERROR to Circuit Court of Summit county. *Messrs. Musser, Kimber & Huffman* and *Mr. Scott D. Kenfield*, for plaintiff in error. *Mr. W. E. Pardee*; *Mr. J. M. Poulson*; *Messrs. Slabaugh, Seiberling & Huber* and *Mr. S. D. Kenfield*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

Without Opinion.

No. 13448. THE LOOMIS REALTY CO. ET AL. *v.* THE GOODYEAR TIRE & RUBBER CO. Decided September 23, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Hoyt, Dustin, Kelley, McKeehan & Andrews*, for plaintiffs in error. *Messrs. Ammerman & Thompson*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13985. JOHNSON, RECEIVER, ET AL. *v.* WEIKART, ADMR. Decided September 23, 1913. ERROR to Circuit Court of Clark county. *Messrs. Keifer & Keifer*, for plaintiffs in error. *Mr. John L. Zimmerman* and *Mr. M. Ray Weikart*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13998. CITY OF SPRINGFIELD *v.* MEYER, ADMX. Decided September 23, 1913. ERROR to Circuit Court of Clark county. *Mr. Howard E. MacGregor*, city solicitor, and *Mr. John M. Cole*, for plaintiff in error. *Mr. Stewart L. Tatum*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14051. THE TOLEDO & OHIO CENTRAL RAILWAY CO. *v.* SHERMAN, ADMX. Decided September 23, 1913. ERROR to Court of Appeals of Lucas county. *Messrs. Doyle & Lewis*, for plaintiff in error. *Mr. Orville S. Brumback*, for

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defendant in error. Judgment affirmed on ground stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said court of appeals be, and the same is hereby, affirmed.

The court finds that the findings of error made by the court of appeals and included in its entry of February 13, 1913, were correct; and this court further finds that the court of common pleas erred in ruling out evidence offered by the plaintiff to show the existence of rule 915 and the decedent's knowledge of such rule;

It is further ordered that this cause be remanded to the court of common pleas of Lucas county for further proceedings according to law.

JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14053. DEAN, AUDITOR, ET AL. *v.* THE STATE, EX REL. JOINT DISTRICT BOARD OF COUNTY COMMISSIONERS OF CLARK, CHAMPAIGN, GREENE AND MADISON COUNTIES. Decided September 23, 1913. ERROR to Circuit Court of Greene county. *Mr. Marcus Shoup; Mr. W. F. Orr; Mr. F. L. Johnson and Messrs. Smith & Smith*, for plaintiffs in error. *Mr. Charles E. Ballard; Mr. C. C. Crabbe and Mr. Charles H. Duncan*, for defendant in error. Judgment affirmed an authority of *Brissel et al., Commissioners, et al. v. The State, ex rel. McCammon*, 87 Ohio St., 154. SHAUCK, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. JOHNSON, J., not participating.

Without Opinion.

No. 14234. DRUM, A TAXPAYER, ETC. *v.* THE CITY OF CLEVELAND ET AL. Decided September 23, 1913. ERROR to Court of Appeals of Cuyahoga county. *Messrs. Squire, Sanders & Dempsey*, for plaintiff in error. *Mr. E. K. Wilcox*, city solicitor, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13390. YOCUM *v.* THE VILLAGE OF DEGRAFF. Decided September 30, 1913. ERROR to Circuit Court of Logan county. *Mr. John F. Emans*; *Mr. H. Edmund Garling* and *Messrs. Halfhill, Quail & Kirk*, for plaintiff in error. *Mr. Edward K. Campbell*; *Mr. J. E. West* and *Mr. William W. Riddle*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE and WILKIN, JJ., concur.

No. 13395. THE STATE, EX REL. GILLMER, PROSECUTING ATTORNEY, *v.* SAGER. Decided September 30, 1913. ERROR to Circuit Court of Trumbull county. *Messrs. Fillius & Fillius*, for plaintiff in error. *Mr. Washington Hyde*, for defendant in error. Judgment reversed on authority of *The State, ex rel. Maher, v. Baker, ante*, 165, and because the money received was not a collection within the meaning of the statute. SHAUCK, JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13417. THE STATE, EX REL. RICE, *v.* THE CITY OF XENIA. Decided September 30,

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1913. ERROR to Circuit Court of Greene county. *Mr. M. J. Hartley* and *Mr. Marcus Shoup*, for plaintiff in error. *Mr. Harry D. Smith*, city solicitor, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13427. SELBY ET AL. *v.* HATFIELD ET AL., TRUSTEES OF WAYNE TOWNSHIP. Decided September 30, 1913. ERROR to Circuit Court of Wayne county. *Messrs. McClaran & Jones* and *Mr. M. C. Rouch*, for plaintiffs in error. *Mr. Lyman R. Critchfield, Jr.*, prosecuting attorney, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, WANAMAKER and NEWMAN, JJ., concur.

No. 13455. THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY Co. *v.* STEINHELPER. Decided September 30, 1913. ERROR to Circuit Court of Crawford county. *Messrs. Cummings, McBride & Wolfe* and *Mr. H. R. Schuler*, for plaintiff in error. *Mr. R. V. Sears* and *Messrs. Finley & Gallinger*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13458. THE BOARD OF EDUCATION OF THE VILLAGE OF NEW BOSTON *v.* RARDIN. Decided September 30, 1913. ERROR to Circuit Court of Scioto county. *Mr. Horace L. Small*, for plaintiff

Without Opinion.

in error. *Messrs. Bannon & Bannon; Mr. J. R. Gilliland and Mr. William J. Meyer*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur.

No. 13465. OHIO HAY & GRAIN CO. *v.* NULL. Decided September 30, 1913. ERROR to Circuit Court of Hancock county. *Messrs. Axline & Betts*, for plaintiff in error. *Messrs. Burket & Burket*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13473. THE CITY OF DAYTON *v.* WARREN BROTHERS Co. Decided September 30, 1913. ERROR to Circuit Court of Montgomery county. *Mr. Frank S. Breene; Mr. Albert J. Dwyer and Mr. John Roehm*, for plaintiff in error. *Mr. Wellmore B. Turner; Mr. Alfred McCray and Messrs. Gottschall & Turner*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13475. THE ARTHUR COAL & COKE CO. *v.* THE PITTSBURG COAL CO. Decided September 30, 1913. ERROR to Circuit Court of Cuyahoga county. *Messrs. Lang, Cassidy & Copeland*, for plaintiff in error. *Messrs. Holding, Masten, Duncan & Leckie*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

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No. 13479. SEARS ET AL. *v.* CLIMER ET AL.
Decided September 30, 1913. ERROR to Circuit Court of Morrow county. *Messrs. Harlan & Wood* and *Mr. Benjamin Olds*, for plaintiffs in error. *Mr. J. W. Barry* and *Mr. John S. Hayman*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13486. WINTERROWD *v.* THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF DARKE COUNTY, OHIO. Decided September 30, 1913. ERROR to Circuit Court of Darke county. *Messrs. Bickel & Baker*, for plaintiff in error. *Messrs. Meeker & Gaskill*, for defendant in error. Judgment reversed on ground stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and this court coming now to render such judgment as the circuit court should have rendered, it is hereby ordered and adjudge that the judgment of the court of common pleas be reversed and that said cause be remanded to the court of common pleas of Darke county, with directions to overrule the demurrer of the defendant to the first and second causes of action in the petition of plaintiff, for the reason that the sixty days mentioned in section 10 of the by-laws of defendant company begin to run from the expiration of thirty days after date of notification of assessment, and not from date of notification; said common pleas court, thereupon, to proceed according to law.

Without Opinion.

NICHOLS, C. J., DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13490. SMITH *v.* GRATIGNY ET AL. Decided September 30, 1913. ERROR to Circuit Court of Monroe county. *Mr. D. E. Yost*, for plaintiff in error. *Mr. F. A. Jeffers* and *Messrs. Lynch & Lynch*, for defendants in error. Judgment of the circuit court reversed and that of the common pleas affirmed. SHAUCK, JOHNSON, DONAHUE and NEWMAN, JJ., concur.

No. 13491. RENO *v.* LOVE ET AL. Decided September 30, 1913. ERROR to Circuit Court of Lucas county. *Mr. Benjamin F. Reno*, in *propria persona*. *Mr. Timothy S. Hogan*, attorney general; *Messrs. Kohn, Northup & Morgan* and *Messrs. Fell & Schaal*, for defendants in error. Judgment affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13510. FERGUSON ET AL. *v.* BLINN, TREASURER, ET AL. Decided September 30, 1913. ERROR to Circuit Court of Jefferson county. *Mr. E. L. Finley* and *Mr. C. L. Weems*, for plaintiffs in error. *Mr. W. R. Alban* and *Mr. A. C. Lewis*, for defendants in error. Judgment modified as shown by journal entry by agreement of counsel.

This cause coming on to be heard on the record and pleadings and by agreement of counsel, the

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findings and judgment of the circuit court, of Jefferson county, Ohio, rendered at its December term, 1911, is affirmed, except conclusions of law numbered, "Fourth," "Fifth," and "Sixth," which are hereby modified as follows:

Fifth: Said property, real and personal, of plaintiff in error, W. B. Ralston, is subject to an extra tax, only, for the construction of the Bloomfield and Fairplay free turnpike road.

Sixth: Said property, real and personal, of plaintiffs in error, William Miller, Nora Miller, Maggie Owens and the heirs of Susanna M. Miller, deceased, and Samuel Miller, deceased, D. M. Hervey, Isaac Hicks, S. N. Bell, Carrie Bell and W. W. Hicks, is subject to an extra tax, only, for the construction of the Bloomfield and Western free turnpike road, as shown by "Exhibit A," except one-third (1-3) of the taxable valuation of the real and personal property of William Miller, Nora Miller, Maggie Owens and the heirs of Susanna M. Miller, deceased, and Samuel Miller, deceased, which said one-third (1-3) taxable valuation, shall be subject to an extra tax, only, for the construction of the Unionport and Smithfield free turnpike road. Plaintiffs in error and defendants in error to pay, each one-half (1-2) of the costs of this action.

And it is hereby ordered that a mandate be sent to the court of appeals Jefferson county, Ohio, to carry this judgment as modified, into execution.

No. 14069. THE STATE OF OHIO *v.* BUNDY.
Decided September 30, 1913. ERROR to Court of

Without Opinion.

Appeals of Logan county. *Mr. Forest G. Long* and *Mr. Ernest Thompson*, for plaintiff in error. *Mr. Kent W. Hughes* and *Mr. A. Jay Miller*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14084. THE CINCINNATI TRACTION CO. ET AL. *v.* CARPENTER, A TAXPAYER, ET AL. Decided September 30, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Alfred Bettman*, city solicitor; *Mr. George H. Warrington* and *Mr. Joseph Wilby*, for plaintiffs in error. *Messrs. Dinsmore & Shohl*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14085. THE CINCINNATI TRACTION CO. ET AL. *v.* CARPENTER, A TAXPAYER, ET AL. Decided September 30, 1913. ERROR to the Circuit Court of Hamilton county. *Mr. Alfred Bettman*, city solicitor; *Mr. George H. Warrington* and *Mr. Joseph Wilby*, for plaintiffs in error. *Messrs. Dinsmore & Shohl*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 14247. THE STATE, EX REL. WALTON, *v.* EDMONDSON, AUDITOR. Decided September 30, 1913. ERROR to the Court of Appeals of Hamilton county. *Mr. Alfred Bettman*, for plaintiff in error.

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Mr. Thomas L. Pogue; Mr. John V. Campbell and Mr. Charles A. Groom, for defendant in error. Judgment reversed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

For opinion, see 89 Ohio State.—REPORTER.

No. 13234. HINKLE, ADMX., *v.* HINKLE ET AL. Decided October 7, 1913. ERROR to Circuit Court of Clark county. *Mr. John M. Cole and Mr. Burt Rabbitts*, for plaintiff in error. *Mr. John L. Zimmerman; Mr. Webb W. Witmeyer and Mr. M. Ray Weikart*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13267. FISH ET AL. *v.* ROBINSON. Decided October 7, 1913. ERROR to Circuit Court of Hamilton county. *Messrs. Kramer & Bettman*, for plaintiffs in error. *Messrs. Sayler & Sayler*, for defendant in error. Judgments of the circuit and superior courts reversed. Judgment for plaintiffs in error on the pleadings. See journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed; and this court finds that the said circuit court erred in affirming the judgment of the superior court of Cincinnati in said cause, and that the said superior court erred in sustaining the motion of the plaintiff in said cause in said court for judgment on the pleadings and erred in entering judgment on the pleadings.

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This court finds that the following provision in the lease set out in said pleadings, to-wit: "It is understood that the parties of the second part shall not sell, rent, transfer or assign the leased premises, or any part thereof, without the written consent of the party of the first part, or his authorized agent, under a forfeiture of five thousand dollars," is a provision for a penalty not enforceable in said action.

Coming now to render the judgment which the said superior court should have rendered, it is ordered and adjudged that the petition of the plaintiff in the said superior court be, and the same is hereby, dismissed.

JOHNSON, DONAHUE, WANAMAKER. NEWMAN and WILKIN, JJ., concur.

No. 13285. COCHRAN *v.* RIGHTMIRE. Decided October 7, 1913. ERROR to Circuit Court of Knox county. *Messrs. Ammerman & Thompson*, for plaintiff in error. *Messrs. Owen & Carr*, for defendant in error. Judgment affirmed on grounds stated in journal entry.

It is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; for the sole reason that it appears from the record that one of the assignments of error in the petition in error in the circuit court was that the common pleas court erred in overruling the motion of plaintiff in error for a new trial, one of the grounds of which motion was that the verdict was against the

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weight of the evidence, the entry of the judgment in the circuit court being that there is error apparent on the record in the proceeding of the common pleas court but not specifying any particular error.

But this court further finds that there was no error in the charge of the common pleas court to the jury on the trial of said action nor any other error in the record of said cause in the common pleas court.

NICHOLS, C. J., SHAUCK, JOHNSON, NEWMAN and WILKIN, JJ., concur.

No. 13454. WHITE ET AL. *v.* THE FIRST NATIONAL BANK OF TIPTON, INDIANA. Decided October 7, 1913. ERROR to Circuit Court of Allen county. *Messrs. Becker & Becker* and *Mr. Walter B. Richie*, for plaintiffs in error. *Messrs. Cable & Parmenter*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13494. MCCRERY ET AL. *v.* THE COLUMBIA CONTRACTING Co. Decided October 7, 1913. ERROR to Circuit Court of Champaign county. *Messrs. Johnson & Miller*, for plaintiffs in error. *Mr. C. B. Heiserman*, for defendant in error. Judgment affirmed. SHAUCK, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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No. 13496. *WILLIAMS v. BARROW*. Decided October 7, 1913. ERROR to Circuit Court of Perry county. *Mr. John C. Pettit*, for plaintiff in error. *Mr. Harley M. Whitcraft* and *Mr. T. B. Williams*, for defendant in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13504. *LOWELL ET AL., RECEIVERS, v. PERKINS*. Decided October 7, 1913. ERROR to Circuit Court of Pike county. *Mr. E. H. Willis*, for plaintiffs in error. *Mr. L. G. Dill* and *Mr. S. L. Patterson*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and WILKIN, JJ., concur. NICHOLS, C. J., and NEWMAN, J., not participating.

No. 13507. *ALTIC v. STEFFY ET AL.* Decided October 7, 1913. ERROR to Circuit Court of Darke county. *Mr. Martin B. Trainor*, for plaintiff in error. *Messrs. Bickel & Baker*, for defendants in error. Judgment affirmed. NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13508. *THE DELAWARE COUNTY TELEPHONE Co. v. SHAVER*. Decided October 7, 1913. ERROR to Circuit Court of Delaware county. *Mr. Harry Leonard* and *Messrs. Jewell & Benton*, for plaintiff in error. *Messrs. Marriott, Freshwater & Bliss*, for defendant in error. Judgment

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of the circuit court reversed and common pleas court affirmed. JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13509. THE PRUDENTIAL INSURANCE CO. OF AMERICA *v.* MEYERS. Decided October 7, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Michael G. Heintz*, for plaintiff in error. *Mr. I. L. Huddle* and *Mr. Samuel W. Bell*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13525. THE FOURTH NATIONAL BANK OF CADIZ *v.* ROGERS. Decided October 7, 1913. ERROR to Circuit Court of Harrison county. *Mr. Milton Taggart* and *Mr. Albert O. Barnes*, for plaintiff in error. *Messrs. Hollingsworth & Worley*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13527. THE CITY OF TOLEDO ET AL. *v.* SMITH ET AL. Decided October 7, 1913. ERROR to Circuit Court of Lucas county. *Mr. Cornell Schreiber*, city solicitor, and *Mr. B. A. Hayes*, for plaintiffs in error. *Messrs. Kohn, Northup &*

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Morgan, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13529. GERMAN FIRE INSURANCE CO. OF THE CITY OF PITTSBURGH *v.* BURKE. Decided October 7, 1913. ERROR to Circuit Court of Cuyahoga county. *Mr. C. W. Fuller* and *Mr. L. R. Canfield*, for plaintiff in error. *Mr. Robert E. McKisson*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13545. GREEN ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF LICKING COUNTY ET AL. Decided October 7, 1913. ERROR to Circuit Court of Licking county. *Messrs. Smythe & Smythe*, for plaintiffs in error. *Messrs. Fitzgibbon & Montgomery*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13547. WOLFORD ET AL. *v.* BOARD OF COUNTY COMMISSIONERS OF RICHLAND COUNTY ET AL. Decided October 7, 1913. ERROR to Circuit Court of Richland county. *Messrs. Finley & Gallinger*, for plaintiffs in error. *Mr. James W. Galbraith*, prosecuting attorney; *Mr. B. F.*

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Long and *Mr. C. H. Huston*, for defendants in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13845. HOLDEN *v.* KNAPP ET AL., PARTNERS AS HICKORY CARRIAGE CO. Decided October 7, 1913. ERROR to Circuit Court of Hamilton county. *Mr. Charles M. Cist*, for plaintiff in error. *Mr. Stanley Matthews* and *Mr. E. H. Matthews*, for defendants in error. Judgment of the circuit court reversed and that of the superior court affirmed. SHAUCK, JOHNSON, DONAHUE, WANAMAKER, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13288. SMITH *v.* ROBERTS. Decided October 14, 1913. ERROR to Circuit Court of Trumbull county. *Mr. Wade R. Deemer* for plaintiff in error. *Mr. D. J. Hartwell*, for defendant in error. Judgment of the circuit court reversed and that of the common pleas court affirmed on grounds stated in journal entry.

It is ordered and adjudged by this court, that the judgment of the said circuit court be, and the same hereby is, reversed. This court finds that the errors for which the said circuit court reversed the judgment of the common pleas, as stated in its journal entry, were not prejudicial, and that on the whole record substantial justice was done between the parties by the judgment of

Without Opinion.

the justice of the peace. And coming now to render the judgment that the circuit court should have rendered,

It is hereby ordered and adjudged that the judgment of the court of common pleas in said cause be, and the same hereby is, affirmed.

NICHOLS, C. J., JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur.

No. 13499. ESSELBORN ET AL. *v.* ARNOLD, ADMR. Decided October 14, 1913. ERROR to Circuit Court of Scioto county. *Messrs. Bannon & Bannon* and *Mr. William J. Meyer*, for plaintiffs in error. *Mr. Theodore K. Funk*, for defendant in error. Judgment of circuit court reversed and that of the common pleas court affirmed. SHAUCK, JOHNSON, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

No. 13500. THE KENTON TELEPHONE CO. *v.* HUMMER. Decided October 14, 1913. ERROR to Circuit Court of Hardin county. *Messrs. Cable & Parmenter*, for plaintiff in error. *Messrs. Stickle & Cessna*, for defendant in error. Judgment affirmed. NICHOLS, C. J., SHAUCK, JOHNSON, WANAMAKER and WILKIN, JJ., concur.

No. 13506. NAUSS *v.* REAM ET AL. Decided October 14, 1913. ERROR to Circuit Court of Darke county. *Mr. Martin B. Trainor*, for plaintiff in error. *Mr. George W. Mannix, Jr.*; *Mr.*

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John C. Clark; Mr. D. W. Bowman and Messrs. Bickel & Baker, for defendants in error. Judgment affirmed. SHAUCK, JOHNSON, WANAMAKER, NEWMAN and WILKIN, JJ., concur.

No. 13540. HOBBS ET AL. *v.* SWEM. Decided October 14, 1913. ERROR to Circuit Court of Belmont county. *Mr. E. T. Petty*, for plaintiffs in error. *Messrs. Prophet & Eastman and Mr. G. A. Colpitts*, for defendant in error. Judgment affirmed on the authority of *Smith v. Smith*, 57 Ohio St., 27. NICHOLS, C. J., SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur.

No. 13551. VENTOLO *v.* RINALDI. Decided October 14, 1913. ERROR to Circuit Court of Jefferson county. *Mr. A. C. Lewis and Mr. R. R. Carpenter*, for plaintiff in error. *Mr. E. Dewitt Erskine*, for defendant in error. Judgment affirmed. JOHNSON, DONAHUE, WANAMAKER and NEWMAN, JJ., concur. NICHOLS, C. J., not participating.

No. 13554. SLOAN *v.* THE LORAIN COAL & DOCK Co. Decided October 14, 1913. ERROR to Circuit Court of Belmont county. *Mr. James M. Rees*, for plaintiff in error. *Mr. P. P. Lewis*, for defendant in error. Judgment affirmed. SHAUCK, JOHNSON, DONAHUE, NEWMAN and WILKIN, JJ., concur. NICHOLS, C. J., not participating.

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Under Article 18, of the constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters, when. See *State, ex rel., v. Lynch*, 71.

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Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

CITIES AND VILLAGES—

Under Article 18, of the constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

Municipalities are not insurers of safety of streets and sidewalks, but are required to keep same in a reasonably safe condition—Right of trial by jury inviolate—Order of judge directing verdict, violation thereof—Ordinary care, reasonable safety, etc., questions for jury, when. See *Gibbs v. Village of Girard*, 34.

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to

Cities and Villages—Collection of Taxes.

CITIES AND VILLAGES—Continued.

repair, replace or reconstruct public property damaged by floods of March, 1913, is constitutional. See *Assur v. Cincinnati*, 181. Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Basis of calculation for issuance of bonds established, how—Amount of income from tax levies determined, how—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

CITY SOLICITOR—

The act of April 16, 1913 (103 O. L. 552), amending Section 5649-3b, General Code, substituting city solicitors for prosecuting attorneys on budget commissions in certain counties, is not an act providing for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

CLERK OF COURTS—

A nonresident attorney should not rely upon notification by opposite counsel or clerk of courts of date set for trial. See *Hahn v. McBride*, 511.

COLLATERAL INDEMNITY—

Co-suretyship and contribution do not exist where several surety companies are bound to same principal on separate bonds, each surety limiting liability to proportion of loss by obligee—Collateral or securities given to one surety do not inure to benefit of all, when—Distribution of assets among sureties upon assignment by principal for benefit of creditors. See *Realisation Co. v. Bonding Co.*, 216.

COLLECTION OF TAXES—

A person employed by contract with county to discover property and taxes omitted from duplicate is entitled to compensation

Collection of Taxes—Concealment of Facts.

COLLECTION OF TAXES—Continued.

only out of taxes recovered during term of contract—Such person is not entitled to compensation out of taxes subsequently collected on omitted property discovered by him—Services in inducing subsequent auditor to place same omitted property on duplicate for time not included in contract, held to be gratuitous. See *Edmondson v. Deckebach*, 48.

COMMERCIAL PAPER—

It is the policy of the law to protect rights of innocent holders, whether individuals or corporations—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

COMMON LAW ACTION—

Malice and want of probable cause must be alleged and proven in an action for damages for causing an attachment to issue, when—Section 10254, General Code, requiring attachment bond, does not affect common law right of action, when. See *Crow v. Sims*, 214.

COMPENSATION—

A person employed by contract with county to discover property and taxes omitted from duplicate is entitled to compensation only out of taxes recovered during term of contract—Such person is not entitled to compensation out of taxes subsequently collected on omitted property discovered by him—Services in inducing subsequent auditor to place same omitted property on duplicate for time not included in contract, held to be gratuitous. See *Edmondson v. Deckebach*, 48.

Municipalities may demand and receive from telephone companies for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state—Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when. See *Telephone Co. v. Columbus*, 466.

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

CONCEALMENT OF FACTS—

Failure by insured to mention, to underwriters of fire insurance policy, release for damages by fire, question for court whether a material concealment, when. See *Ensel v. Insurance Co.*, 269.

Condemnation Proceedings—Constitutional Law.

CONDEMNATION PROCEEDINGS—

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

CONDUCTOR—

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

CONSTITUTIONAL LAW—

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, when—Such amendments are incorporated in proposed law, when—In proceedings against secretary of state to enjoin submission to electors, Section 1b, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

Section 1d, Article 2, Constitution—Laws providing for tax levies not subject to referendum—Does not apply to act amending Sections 5649-2 and 5649-3b, General Code—Relative to limitation of tax rate and reorganization of budget commissions—Such enactment not effective for ninety days, when—Constitutional law—An act to amend Sections 5649-2 and 5649-3b and repeal Section 5649-3, General Code, relative to the limitation of a tax rate, passed April 16, 1913, approved May 6, 1913, and filed in the office of the secretary of state May 9, 1913, is not a law providing for tax levies within the meaning of those words, as used in Section 1d of Article 2, of the Constitution, and the same can not go into effect until ninety days after it was filed in the office of the secretary of state. State, ex rel., v. Milroy, 301.

The act of April 10, 1913 (103 O. L. 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, does not contravene Sections 2 and 26, Article 2, or Sections 1 and 6, Article 13, of the Constitution. See *Assur v. Cincinnati*, 181.

Section 5210, General Code, being of unequal operation, the provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

Constitutional Law.

CONSTITUTIONAL LAW—Continued.

1. *Such interpretation of a provision of the constitution—Will be given as will promote the objects of its adoption, when—*Such interpretation will be given to a provision of the constitution as will promote the object of the people in adopting it, when such object is clearly indicated in the context, and to this end narrow and technical definitions of particular words will be disregarded. *Hupp v. Hock-Hocking Co.*, 61.
2. *Rights to invoke jurisdiction—Not revoked by amendment, when—*Rights to invoke the jurisdiction of courts of review, which are secured to litigants by valid laws in force during the progress of a litigation, will not be held to have been afterwards revoked by amendment, unless by express language or by provisions from which it must follow by necessary implication that such result was intended. *Ib.*
3. *Amendments, Sections 2 and 6, to Article 4, Constitution—Jurisdiction of supreme court—Cases decided by circuit court prior to January 1, 1913—Pending in supreme court, when—*Constitutional law—*Court procedure—*The amendments—Sections 2 and 6 to Article 4, of the Constitution—adopted September 3, 1912, and which by the schedule adopted at the same election, went into effect January 1, 1913, do not revoke the jurisdiction of the supreme court to review cases decided by the circuit courts prior to January 1, 1913, in which the petition in error was filed in the supreme court after that date in accordance with the laws in existence at the time of the decision by the circuit court. *Ib.*

Under Article 4, Constitution as amended in 1912 and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

1. *Article 18, Constitution, as amended—Continues in force the general laws—For government of municipalities—Until changed by (1) general laws, (2) additional laws ratified by electors, (3) adoption of municipal charter—*The provisions of the eighteenth article of the constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following,

Constitutional Law—Construction of Constitution.

CONSTITUTIONAL LAW—Continued.

and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment, (2) by additional laws to be ratified by the electors of the municipality to be affected thereby, (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article. *State, ex rel., v. Lynch*, 71.

2. *Home rule*—*Municipality may not establish moving-picture theaters, when*—Whether a municipality acquires authority "to exercise all the powers of local self-government" by adopting a charter, or adopts a charter as an indispensable mode of exercising the authority, the powers to be exercised, being governmental, do not authorize taxation to establish and maintain moving-picture theaters. *Ib.*

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

CONSTRUCTION OF CONSTITUTION—

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, *when*—Such amendments are incorporated in proposed law, *when*—In proceedings against secretary of state to enjoin submission to electors, Section 1*b*, Article 2, Constitution (1912), will not be rigidly construed, *when*. See *Pfeifer v. Graves*, 473.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3*b*, General Code, establishing budget commissions, does not provide for tax levies within Section 1*d*, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, does not contravene Sections 2 and 26, Article 2, or Sections 1 and 6, Article 13, of the Constitution. See *Assur v. Cincinnati*, 181.

Provisions of constitution will be interpreted to promote objects of adoption, and narrow and technical definitions will be disregarded, *when*—Rights to invoke jurisdiction of courts of review will not be held to have been revoked, *when*—Sections

Construction of Constitution—Construction of Contract.

CONSTRUCTION OF CONSTITUTION—Continued.

2 and 6, Article 4, amendments to Constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Under Article 4, Constitution as amended in 1912, and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

Under Article 18, of the Constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

CONSTRUCTION OF CONTRACT—

A person employed by contract with county to discover property and taxes omitted from duplicate is entitled to compensation only out of taxes recovered during term of contract—Such person is not entitled to compensation out of taxes subsequently collected on omitted property discovered by him—Services in inducing subsequent auditor to place same omitted property on duplicate for time not included in contract, held to be gratuitous. See *Edmondson v. Deckebach*, 48.

Where underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Underwriters advised of nature and extent of risk by description in policy, when—Failure by insured to mention release for damages by fire, question for court whether a material conceal-

Construction of Contract—Construction of Statutes.

CONSTRUCTION OF CONTRACT—Continued.

ment, when—Stipulation in policy for subrogation in case of fire, construed against insurer, when—Where property insured is lumber of building in process of demolition, fee simple ownership clause does not apply, when—Chattel mortgage encumbrance clause in policy does not release insurer, when. See *Ensel v. Insurance Co.*, 269.

All the provisions of a contract construed together, when—Knowledge by employer or previous default by employe, not a defense to a suit on a surety bond, when. See *Legler, Admr., v. Guaranty Co.*, 336.

CONSTRUCTION OF STATUTES—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

Under Section 3244, Revised Statutes (Section 8634, General Code), incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

Section 5210, General Code, being of unequal operation, the provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitations. See *State, ex rel., v. Milroy*, 301.

Construction of Statutes—Contract.

CONSTRUCTION OF STATUTES—Continued.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

Sale of real estate in partition proceeding, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when. See *Weir v. Saw Mill Co.*, 424.

Section 10254, General Code, requiring attachment bond, does not affect common law right of action for damages for causing attachment to issue, when. See *Crow v. Sims*, 214.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, and may be substituted as defendant (Section 11363, General Code) and will be bound by verdict and judgment—Statute of limitations (Section 11224, General Code) ceases to run from time real defendant answers for party sued. See *Boehmke v. Traction Co.*, 156.

CONTEMPT OF COURT—

Misconduct of counsel in addressing jury does not constitute reversible error, but contempt is committed, when. See *Driscoll v. Traction Co.*, 150.

CONTRACT—

1. *Contract by county with person—To search for concealed and unassessed taxable realty—Omitted from tax duplicate—Searcher not entitled to compensation for taxes collected—In and for time subsequent to expiration of contract, when—*A contract made by a county through its proper officers, employing a person to search for and discover concealed and unassessed taxable real estate that had been omitted from the assessment rolls and tax duplicate of that county, upon which property the taxes "are lawfully due and unpaid," which contract provides that the person so employed is to receive for his services a certain percentage of the taxes actually recovered by the county treasurer from assessments on such omitted real estate and further provides that the compensation agreed upon "shall not be deemed due and owing until the taxes upon such omitted real estate have actually been paid into the county treasury," does not authorize the payment of any compensation to such person so employed out of taxes levied and collected on this real estate at and for a time subsequent to the expiration of the term of the contract. *Edmondson v. Deckebach*, 48.

Contract.

CONTRACT—Continued.

2. *Contract comprehends only taxes then due and unpaid*—Such taxes determine compensation and provide fund for payment for services—Such contract, by its express terms, relates to and comprehends only the taxes that then are lawfully due and unpaid upon such omitted real estate, and these taxes not only measure the amount of compensation to be paid him under this contract, but also provide the only fund out of which he can be paid for such services. *Ib.*
3. *If taxes never collected—Searcher not entitled to compensation—From taxes subsequently collected on same property*—Where, under such contract, omitted property is discovered by the person so employed, and the taxes then due, with penalties, are placed upon the tax duplicate against this property, but these taxes and penalties are never actually paid into the county treasury, the reasons for failure to collect the same are unimportant. In such case, under the express terms of this contract, there is nothing due and owing to the person so employed for his services in securing taxes and penalties to be placed upon the tax duplicate, and his right to compensation out of these taxes, had they been collected, can not be transferred to other taxes subsequently collected upon the same property. *Ib.*
4. *Services rendered after life of contract gratuitous, when—*The right of the person so employed to compensation for his services, under the terms of this contract, is confined to the services rendered by him during the life of the contract, and any services rendered by him at a later time, by which he induced a subsequent auditor to make use of the facts discovered by him and place the property on the tax duplicate for a period of years long subsequent to the termination of the contract, must be held to be gratuitous and do not entitle him to be paid out of the taxes collected for these subsequent years for any services rendered during the term of the contract. *Ib.*

In an action for specific performance of contract for sale of land, it must be shown that agent's authority was identical with terms of contract sued on—If terms of contract vary from express authority, agreement void and unenforcible—Where express authority rests in parol, proof of parol authority must be clear and convincing and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

Where underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Underwrit-

Contract—Corporations.

CONTRACT—Continued.

ers advised of nature and extent of risk by description in policy, when—Failure by insured to mention release for damages by fire, question for court whether a material concealment, when—Stipulation in policy for subrogation in case of fire, construed against insurer, when—Where property insured is lumber of building in process of demolition, fee simple ownership clause does not apply, when—Chattel mortgage encumbrance clause in policy does not release insurer, when. See *Ensel v. Insurance Co.*, 269.

All the provisions of a contract construed together, when—Knowledge by employer of previous default by employe, not a defense to a suit on a surety bond, when. See *Legler, Admr., v. Guaranty Co.*, 336.

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

CONTRIBUTING MEMBERS—

The provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

CONTRIBUTION—

Co-suretyship and contribution do not exist where several surety companies are bound to same principal on separate bonds, each surety limiting liability to proportion of loss by obligee—Collateral or securities given to one surety do not inure to benefit of all, when—Where principal makes assignment for benefit of creditors and a company purchases from assignee all assets (except cash), company liable for specific dividend guaranteed and entitled to surplus of collateral in hands of secured companies, when. See *Realization Co. v. Bonding Co.*, 216.

CONTRIBUTORY NEGLIGENCE—

An engineer of a railroad train is not guilty of negligence in misinterpreting a signal given him by a conductor, when. See *Railroad Co. v. Fouts*, 305.

CORPORATIONS—

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary

corporations—Co-suretyship,

CORPORATIONS—Continued.

discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Under Section 8634, General Code, incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Knowledge of officers and agents of corporation is imputed to company, when—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when—Municipalities may demand and receive from telephone companies, for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state, when. See *Telephone Co. v. Columbus*, 466.

CO-SURETYSHIP—

1. *Co-suretyship does not exist—Where sureties are bound to same principal on separate instruments—Each bond limiting liability proportionately to total loss by obligee—Where several surety companies are bound by separate instruments on account of the same principal, and each company, by its bond, limits its liability, in the event of default on the part of the principal, to such proportion of the total loss sustained by the obligee as the penalty named in its bond bears to the total amount of the bonds furnished by a principal to the obligee, the suretyship of each company is a separate and distinct transaction and the relation of co-suretyship among them does not arise, nor does the right of contribution exist. Realization Co. v. Bonding Co.*, 216.
2. *Collateral given to indemnify one surety—Does not inure to benefit of all, when—Where, in such case, collateral or securities are placed by the principal in the hands of one of the companies to indemnify it against any loss it might incur by reason of its obligation on its bond, none of the other companies, in the event of the default of the principal, is entitled to any part of such collateral or securities to indemnify it against a loss incurred on account of its bond. Ib.*
3. *Distribution of assets among respective sureties—Law of suretyship and assignment—The principal, indebted at the time to the obligee on the obligation for which the bonds were re-*

Co-suretyship—Court of Appeals.

CO-SURETYSHIP—Continued.

quired, made an assignment for the benefit of its creditors, and the claim of the obligee against the principal was allowed by the assignee; the several surety companies paid to the obligee the amount of this claim, each company paying the proportionate share of the indebtedness as provided in its bond, and each company taking an assignment from the obligee of its proper fractional share of the claim of the obligee against the principal and its assignee; subsequently a company, other than the surety companies, purchased all the assets, except cash, of the assignor in the hands of the assignee, and agreed to pay the latter an amount which, with the cash in its hands, would enable it, the assignee, to pay a dividend of fifty per cent. on the face amount of all claims of creditors allowed, which agreement, on the part of the purchaser, was approved by the court of insolvency; prior to the assignment of the principal, it had placed in the hands of two of the surety companies separate collateral or securities to indemnify them.

Held: That the purchaser of the assets of the principal must pay an amount sufficient for a dividend of fifty per cent. on the face amount of the claim of the obligee against the principal, as allowed without any reduction on account of the collateral held by the two secured companies, and that the purchaser of the assets, under its contract of purchase, is entitled to any excess or surplus of collateral remaining after the two secured companies are indemnified thereby. *Ib.*

COUNTIES—

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

The acts of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, is constitutional. See *Assur v. Cincinnati*, 181.

COURT OF APPEALS—

Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to Constitution, adopted in 1912, do not revoke

Court of Appeals—Court Procedure.

COURT OF APPEALS—Continued.

jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Under the constitutional amendments and the schedule, all cases pending in the court shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

COURT PROCEDURE—

The supreme court will not consider weight of evidence, but will consider whether evidence produced in court below attains probative force and certainty required in particular case—To establish lost or destroyed will, evidence must be clear, strong, free from bias and convincing beyond a reasonable doubt—Revocation is presumed where will has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

Constitutional right of jury trial can not be invaded by legislative act or judicial order or decree—Action for damages for negligence in care of sidewalks, presents jury issue, if there is some evidence to prove essential facts necessary to a recovery; order of trial judge directing verdict is a denial and violation of right of trial by jury, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Misconduct of counsel in addressing jury does not constitute reversible error, when. See *Driscoll v. Traction Co.*, 150.

Where underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Failure

Court Procedure—Creditors.

COURT PROCEDURE—Continued.

by insured to mention release for damages by fire, question for court whether a material concealment, when. See *Ensel v. Insurance Co.*, 269.

Under Section 11046, General Code, the court has final authority to determine necessity, etc., for appropriation of public property by railroad; but under Section 8767, General Code, board of directors has primary authority to determine necessity. See *Cincinnati v. Railroad Co.*, 283.

An indictment charging shooting with intent to kill and shooting with intent to wound, includes lesser offenses of assault and battery or assault only, when—Omission of court to so charge jury, will not sustain reversal of judgment of conviction of shooting with intent to wound, when. See *State v. McCoy*, 447.

Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

The supreme court has no authority to pronounce opinion, judgment or decree upon a moot question as to whether proposed law will be constitutional, if enacted by legislature or adopted by people. See *Pfeifer v. Graves*, 473.

If motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

A nonresident attorney should not rely upon notification by opposite counsel or clerk of court of date set for trial. See *Hahn v. McBride*, 511.

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

CREDITORS—

Under Section 8634, General Code, incorporators of corporation for profit are liable to creditors for deficiency in payment of

Creditors—Damages.

CREDITORS—Continued.

ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

CRIMINAL LAW—

Misconduct of counsel in addressing jury does not constitute reversible error, when. See *State v. Tuttle*, 150.

An indictment charging shooting with intent to kill and shooting with intent to wound, includes lesser offenses of assault and battery or assault only, when—Omission of court to so charge jury, will not sustain reversal of judgment of conviction of shooting with intent to wound, when. See *State v. McCoy*, 447.

DAMAGES—

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile. See *Coal Co. v. Rivoux*, 18.

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, present jury issue, when—Directed verdict is violation of right of trial by jury, when. See *Gibbs v. Village of Girard*, 34.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant and will be bound by verdict and judgment—Statute of limitations ceases to run from time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Traction Co.*, 156.

Malice and want of probable cause must be alleged and proven in an action for damages for causing an attachment to issue, when—Action can be maintained on statutory bond, when—Section 10254, General Code, requiring attachment bond, does not affect common law right of action, when. See *Crow v. Sims*, 214.

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

On trial of an action for damages for personal injuries, if motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case

Damages—Directed Verdict.

DAMAGES—Continued.

to the jury, the same must go to the jury, when. See *Parkins v. Commissioners*, 495.

DEEDS—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

DEFENDANT—

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be submitted as defendant and will be bound by verdict and judgment—Statute of limitations ceases to run from time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Traction Co.*, 156.

DEMURRER—

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

DESTROYED WILL—

To establish a lost or destroyed will the evidence must be clear, strong, positive, free from bias and convincing beyond a reasonable doubt—Revocation is presumed where will has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

DIRECTED VERDICT—

An action for damages for negligence in care of sidewalks presents jury issue if there is some evidence to prove essential facts necessary to a recovery; order of trial judge directing verdict is a denial and violation of right of trial by jury, when. See *Gibbs v. Village of Girard*, 34.

Directed Verdict—Eminent Domain.

DIRECTED VERDICT—Continued.

If motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

DITCH CONSTRUCTION—

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

DRAINS AND DITCHES—

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

EASEMENT—

Under Section 8767, General Code, board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property for an easement, but under Section 11046, General Code, the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

ELECTIONS—

Municipalities may determine their officers and the method of their selection, nomination and election—The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government. See *Fitzgerald v. Cleveland*, 338.

EMINENT DOMAIN—

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public prop-

Eminent Domain—Error.

EMINENT DOMAIN—Continued.

erty, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

EMPLOYER AND EMPLOYEE—

Automobile owner is not liable for acts of employee in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile—No implied authority for bookkeeper or cashier to operate company automobile, purchased for use of traveling salesman. See *Coal Co. v. Rivoux*, 18.

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

Knowledge by an employer of previous default by employee, not a defense to a suit on a surety bond, when. See *Legler, Admr., v. Guaranty Co.*, 335.

ENGINEER—

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

EQUITY—

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

ERROR—

The supreme court will not consider weight of evidence, will consider whether evidence produced in court below attains probative force and certainty required in particular case. See *Cole v. McClure et al.*, 1.

Sections 2 and 6, Article 4, amendments to constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Misconduct of counsel in addressing jury does not constitute reversible error, when. See *Driscoll v. Traction Co.*, 150.

Omission of court to charge jury that defendant, indicted for shooting with intent to kill and shooting with intent to wound, may be found guilty of lesser offenses of assault and battery

Error—Evidence.

ERROR—Continued.

or assault only, will not sustain reversal of judgment of conviction of shooting with intent to wound, when—General exception to charge raises no question of error as to omission to give further correct instruction, but presents only questions of errors existing in charge as given. See *State v. McCoy*, 447. Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456. Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

ESTOPPEL—

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

EVIDENCE—

1. *Rule of supreme court in considering evidence in trial court*—On review of the record of a trial below, this court will not consider the mere weight of the evidence, but where the law requires in the particular case a higher quality and quantity of evidence than is sufficient in ordinary cases to support a judgment by the preponderance of proof, this court will consider whether the evidence attains to that high degree of probative force and certainty. (*Ford v. Osborne*, 45 Ohio St., 1, followed and approved.) *Cole v. McClure et al.*, 1.
2. *Evidence required to establish will, lost or destroyed*—To establish a lost or destroyed will the evidence of its execution and its contents must be clear, strong, positive, free from bias, and convincing beyond a reasonable doubt. *Ib.*
3. *Lost or destroyed will—Before death or insanity of testator—Degree and certainty of evidence to overcome presumption of revocation*—Where a will has been lost or destroyed before the death of the testator, the law presumes that he revoked

Evidence—Fire Insurance.

EVIDENCE—Continued.

it; and where he became insane after he made the will, the evidence to overcome this presumption must be certain, satisfactory and conclusive that it was unrevoked and in existence after he became "incapable by reason of insanity to make a will." *Ib.*

Malice and want of probable cause must be alleged and proven in an action for damages for causing an attachment to issue, when. See *Crow v. Sims*, 214.

EXCEPTIONS—

General exception to charge raises no question of error as to omission to give further correct instruction, but presents only questions of errors existing in charge as given. See *State v. McCoy*, 447.

FEE-SIMPLE CLAUSE—

Where property covered by fire insurance policy is lumber of building in process of demolition, fee-simple ownership clause does not apply, when. See *Ensel v. Insurance Co.*, 269.

FIRE INSURANCE—

1. *Fire insurance policy—Time when effective—Question for jury, when*—An insurance agent negotiated for the plaintiff, through the underwriters of an insurance company, a policy in that company. A few months later the underwriters notified the agent that the company would cancel the policy. The agent assented for the plaintiff, but said he would take the usual five days to obtain other insurance. Thereupon the underwriters offered to rewrite the insurance in the defendant company. The plaintiff, through the agent, assented, and a new policy was delivered the same day at two o'clock. The fire occurred at six o'clock.

Held: The court properly submitted to the jury the question as to the time the contract of insurance went into effect, and the finding of the jury that it went into effect at the time of delivery and was not postponed until five days later, is not contrary to law. *Ensel v. Insurance Co.*, 269.

2. *Subject of insurance sufficiently described, when*—The subject of the insurance was described in these words: "On his interest in the lumber in Wabash Elevator No. 4, while on the premises, situated on Middle Ground near the Maumee river, Toledo. It is understood that the building is in process of demolition and said insurance is to cover above-described lumber while on the premises."

Fire Insurance.

FIRE INSURANCE—Continued.

Held: This advised the underwriters of the nature and extent of his interest as an element of the risk. *Ib.*

3. *Failure by insured to mention facts—Constitutes concealment and avoids policy, when—*Plaintiff's interest was acquired from the Wabash Railroad Company by written contract, in which he agreed to demolish the building and release the railroad from all damage by fire caused by it. The underwriters thoroughly inspected the risk on the premises before they wrote the policy. They did not inquire for the contract nor ask the plaintiff any questions, and he made no statement about it. A clause in the policy avoids it, "if the insured conceals any material fact concerning the insurance or any subject thereof."

Held: It was for the court to say whether his failure to mention the release was a material concealment within the terms of the policy. *Ib.*

4. *Subrogation clause in policy—In favor of insurer in case of fire—Construed against insurer, when—*Another clause of the policy provided that: "If the company shall claim the fire was caused by the act or neglect of any person or corporation, the company shall be subrogated to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to the company by the insured."

Held: A stipulation such as the latter can only be used to work a forfeiture *strictissimi juris*. That clause being inserted by the insurer for the protection of the insurer is to be construed most strongly against the insurer and in favor of the insured. In view of the facts disclosed in this case, the court could not by way of purely legal construction give the stipulation the effect which the defendant claimed for it and void the policy. *Ib.*

5. *Fee-simple ownership clause in policy—Does not apply to lumber in building, when—*Another clause avoids the policy, "if the subject of the insurance be a building on ground not owned by the assured in fee-simple." The building was upon the ground described in the policy, but the fee-simple title to the land was not in the plaintiff.

Held: The property insured was not part of the real estate but lumber in a building in process of demolition. Therefore this clause of the policy has no application to this case. *Ib.*

6. *Chattel mortgage incumbrance clause—Does not apply, when—*It also provided that: "If the subject of the insurance be or become incumbered by a chattel mortgage the policy shall be void." There was a railroad mortgage by the Wabash company undischarged at the time it sold the lumber in the building to the plaintiff. That mortgage contained the usual pro-

Fire Insurance—General Assembly.

FIRE INSURANCE—Continued.

viso that the railroad company might dispose of equipment and material, replacing the same with new, and the company was doing that thing.

Held: The mortgage lien upon this lumber was discharged. For this and other reasons this defense was properly excluded. *Ib.*

FLOOD EMERGENCY ACT—

*Act of general assembly of April 10, 1913 (103 O. L., 141)—Authorizing certain county and municipal authorities—To borrow and expend moneys—For repairing and replacing public property—Damaged and destroyed by the flood of March, 1913—And to issue bonds therefor—Is a valid exercise of legislative power—*The act of the general assembly of Ohio, passed April 10, 1913 (103 O. L., 141), entitled: "An act to authorize county commissioners, township trustees, boards of education, road commissioners, councils of municipal corporations and boards and officers thereof temporarily to repair, reconstruct and replace public property and public ways destroyed or injured by floods occurring in March and April, 1913; to authorize county commissioners and councils of municipal corporations to borrow and expend money for the purpose of cleansing public places and private grounds and buildings and removing therefrom any matter deposited therein by said flood which is inimical to the public health, safety or convenience; and to exempt proceedings for the permanent repair, reconstruction and replacement of such public property and public ways, and bonds issued and levies made for such purposes from certain requirements and limitations," is a valid exercise of legislative power conferred by the constitution on the general assembly of this state. *Assur v. Cincinnati*, 181.

FRANCHISE—

Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when—Municipalities may demand and receive from telephone companies, for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state, when. See *Telephone Co. v. Columbus*, 466.

GENERAL ASSEMBLY—

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc.,

General Assembly—General Code.

GENERAL ASSEMBLY—Continued.

to repair, replace or reconstruct public property damaged by floods of March and April, 1913, is constitutional. See *Assur v. Cincinnati*, 181.

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, when—Such amendments are incorporated in proposed law, when—In proceedings against secretary of state to enjoin submission to electors, Section 1*b*, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

GENERAL CODE—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 4306, General Code, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

Section 5210, General Code, being of unequal operation, the provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3*b*, General Code, establishing budget commissions, does not provide for tax levies within Section 1*d*, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Sections 5649-2 to 5649-5*b*, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

Sale of real estate in partition proceeding, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when. See *Weir v. Saw Mill Co.*, 424.

Under Section 8634, General Code, incorporators of corporation for profit are liable to creditors for deficiency in payment of

General Code—Home Rule.

GENERAL CODE—Continued.

ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Under Section 8767, General Code, board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 11046, General Code, the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Section 10254, General Code, requiring attachment bond, does not affect common law right of action for damages for causing attachment to issue, when. See *Crow v. Sims*, 214.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant (Section 11363, General Code) and will be bound by verdict and judgment. Statute of limitations (Section 11224, General Code) ceases to run from time real defendant answers for party sued. See *Boehmke v. Traction Co.*, 156.

GENERAL EXCEPTIONS—

General exception to charge raises no question of error as to omission to give further correct instruction, but presents only questions of errors existing in charge as given. See *State v. McCoy*, 447.

GOVERNMENTAL FUNCTION—

Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

GRANTOR AND GRANTEE—

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

HOME RULE—

Under Article 18 of the Constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

Home Rule—Indictment.

HOME RULE—Continued.

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

IMPUTED KNOWLEDGE—

Knowledge of officers and agents of corporation is imputed to company, when—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

INCORPORATORS—

Incorporators of corporation for profit—Liable for deficiency of ten per cent. of capital stock, when—Section 3244, Revised Statutes—Liability for debts created prior to incorporation—A corporation for profit was duly created and organized under the laws of Ohio in 1906, and became indebted for personal property purchased for use in its proposed business. No part of the capital stock was paid into the treasury of the company. Held: Under Section 3244, Revised Statutes, which was then in force, the incorporators are liable to the creditors of the company to the amount of any deficiency in the actual payment of ten per cent. of the authorized capital stock. (Hessler v. The Cleveland Punch & Shear Works Co., et al., 61 Ohio St., 621, approved and followed.) Ames et al. v. McCaughey, 297.

INDICTMENT—

1. *Indictment charging shooting with intent to kill, etc.—Includes lesser offenses of assault, etc.—Criminal law—An indictment charging, in separate counts, shooting with intent to kill and shooting with intent to wound includes the lesser offenses of assault and battery and assault, and upon the trial of the accused upon such an indictment the jury may find the accused not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery or an assault only. State v. McCoy, 447.*
2. *Court in charge to jury omits mention of certain lesser offenses—Of which accused may be found guilty—Judgment of conviction not reversible for court's omission, when—Where, upon the trial of a person charged by indictment with shooting with*

Indictment—Initiative and Referendum.

INDICTMENT—Continued.

intent to kill and shooting with intent to wound, the court properly charges the jury upon all the issues in the case, except that it inadvertently omits to charge that the defendant might, if the evidence warrants, be found not guilty of shooting with intent to kill and not guilty of shooting with intent to wound, but guilty of assault and battery, and the court's attention is not called to this omission, and no request to give such a charge is made, a judgment of conviction of the accused of shooting with intent to wound should not be reversed for such inadvertent omission of the court to so charge. *Ib.*

3. *General exception to charge of trial court—Does not raise question of error, when—*A general exception to the charge of a trial court to give further correct instruction, but presents only questions of errors of law existing in the charge as given. (*Columbus Railway Co. v. Ritter*, 67 Ohio St., approved and followed.) *Ib.*

INITIATIVE AND REFERENDUM—

1. *Constitutional law—Initiative and referendum—Initiated bill introduced in house—Referred to committee and amended—May be submitted to electors, when—*Section 1b, Article 2, Constitution (1912)—An initiated law, which has been introduced into the house of representatives, in compliance with Section 1b of Article 2, of the revised Constitution of 1912, and referred to the proper committee, which reported it back with amendments which were agreed to by the house, which took no further action upon it, may be submitted as thus amended to the electors of the state in due time after a supplementary petition properly signed and verified has been filed with the secretary of state demanding its submission in its amended form. *Pfeifer et al. v. Graves, etc.*, 473.
2. *Amendments are incorporated in proposed law, when—*Amendments to the proposed law, thus reported and agreed to, are thereby incorporated in it as required by said section. *Ib.*
3. *Constitution will not be construed to exclude submission, when—*In a proceeding against the secretary of state, to enjoin the submission as aforesaid, the section will not be rigidly construed so as to exclude the submission for the reason that the bill as amended was not enacted by the house. *Ib.*
4. *Section 1b, Article 2, Constitution (1912), construed, how—*The language of Section 1b is to be fairly and reasonably interpreted so as to carry out the purpose of the people who

Initiative and Referendum—Interpretation of Constitution.

INITIATIVE AND REFERENDUM—Continued.

adopted the dual form of direct and indirect legislation prescribed therein. *Ib.*

5. *Constitutionality of proposed law will not be determined, when*
—This court has no authority to pronounce an opinion, a judgment or a decree upon a mere moot question as to whether a proposed law will conflict with the Constitution, if it shall be enacted by the general assembly, or be adopted by the people. *Ib.*

INNOCENT HOLDERS—

It is the policy of the law to protect rights of innocent holders, whether individuals or corporations—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

INSANE PERSONS—

Where a testator became insane after making a will, evidence to overcome presumption of revocation of lost or destroyed will must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

INSURANCE—

Where underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Underwriters advised of nature and extent of risk by description in policy, when—Failure by insured to mention release for damages by fire, question for court whether a material concealment, when—Stipulation in policy for subrogation in case of fire, construed against insurer, when—Where property insured is lumber of building in process of demolition, fee-simple ownership clause does not apply, when—Chattel mortgage encumbrance clause in policy does not release insurer, when. See *Ensel v. Insurance Co.*, 269.

INTERPRETATION OF CONSTITUTION—

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, when—Such amendments are incorporated in proposed law, when—In proceedings against secretary of state to enjoin submission to electors, Section 1b, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

Interpretation of Constitution.

INTERPRETATION OF CONSTITUTION—Continued.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Provisions of constitution will be interpreted to promote objects of adoption, and narrow and technical definitions will be disregarded, when—Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Under Article 4, Constitution as amended in 1912 and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, does not contravene Sections 2 and 26, Article 2, or Sections 1 and 6, Article 13, of the Constitution. See *Assur v. Cincinnati*, 181.

Under Article 18, of the Constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

Interpretation of Contract—Interpretation of Statutes.

INTERPRETATION OF CONTRACT—

A person employed by contract with county to discover property and taxes omitted from duplicate is entitled to compensation only out of taxes recovered during term of contract—Such person is not entitled to compensation out of taxes subsequently collected on omitted property discovered by him—Services in inducing subsequent auditor to place same omitted property on duplicate for time not included in contract, held to be gratuitous. See *Edmondson v. Deckebach*, 48.

In an action for specific performance of contract for sale of land, it must be shown that agent's authority was identical with terms of contract sued on—If terms of contract vary from express authority, agreement void and unenforceable—Where express authority rests in parol, proof of parol authority must be clear and convincing and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

Where the underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Underwriters advised of nature and extent of risk by description in policy, when—Failure by insured to mention release for damages by fire, question for court whether a material concealment, when—Stipulation in policy for subrogation in case of fire, construed against insurer, when—Where property insured is lumber of building in process of demolition, fee simple ownership clause does not apply, when—Chattel mortgage encumbrance clause in policy does not release insurer, when. See *Ensel v. Insurance Co.*, 269.

All the provisions of a contract construed together, when—Knowledge by employer of previous default by employe, not a defense to a suit on a surety bond, when. See *Legler, Admr., v. Guaranty Co.*, 336.

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

INTERPRETATION OF STATUTES—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

Interpretation of Statutes.

INTERPRETATION OF STATUTES—Continued.

Under Section 3244, Revised Statutes (Section 8634, General Code), incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

Section 5210, General Code, being of unequal operation, the provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitations. See *State, ex rel., v. Milroy*, 301.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

Sale of real estate in partition proceeding, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when. See *Weir v. Saw Mill Co.*, 424.

Section 10254, General Code, requiring attachment bond, does not affect common law right of action for damages for causing attachment to issue, when. See *Crow v. Sims*, 214.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant (Section 11363, General Code) and will be bound by verdict and judgment—Statute of limitations (Section 11224, General Code) ceases to run from time real

Interpretation of Statutes—Jurisdiction.

INTERPRETATION OF STATUTES—Continued.

defendant answers for party sued. See *Boehmke v. Traction Co.*, 156.

ISSUANCE OF BONDS—

Sections 5649-2 to 5649-5b, General Code, limiting tax rate, furnish basis of calculation for issuance of bonds—Issuance of bonds limited, how. See *Rabe v. Board of Education*, 403.

JUDICIAL SALES—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchase is within protection of Section 8543, General Code, when—Purchaser secures title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

JURISDICTION—

Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to Constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, etc.—Statute of limitations ceases to run, when. See *Boehmke v. Traction Co.*, 156.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

Jurisdiction—Legislature.

JURISDICTION—Continued.

The supreme court has no authority to pronounce opinion, judgment or decree upon a moot question as to whether proposed law will be constitutional, if enacted by legislature or adopted by people. See *Pfeifer v. Graves*, 473.

JURY—

Where underwriters rewrote policy of fire insurance, time when contract goes into effect a question for jury, when—Failure by insured to mention release for damages by fire, question for court whether a material concealment, when. See *Ensel v. Insurance Co.*, 269.

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

JURY SERVICE—

The provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

JURY TRIAL—

Constitutional right of jury trial can not be invaded by legislative act or judicial order or decree—Action for damages for negligence in care of sidewalks, presents jury issue, when; directed verdict is violation of right of jury trial, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

KNOWLEDGE OF AGENT—

Knowledge of officers and agents of corporation is imputed to company, when—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

LAW—

Bill, act and law distinguished. See *Pfeifer v. Graves*, 480.

LEGISLATURE—

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, when—Such amendments are incorporated in proposed law, when—

Lesser Crimes—Lost Will.

LEGISLATURE—Continued.

In proceedings against secretary of state to enjoin submission to electors, Section 1*b*, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

LESSER CRIMES—

An indictment charging shooting with intent to kill and shooting with intent to wound, includes lesser offenses of assault and battery or assault only, when—Omission of count to so charge jury, will not sustain reversal of judgment of conviction of shooting with intent to wound, when. See *State v. McCoy*, 447.

LEVY—

Levies of taxes are limited by Sections 5649-2 to 5649-5*b*, General Code—Basis of calculation for issuance of bonds established, how—Amount of income from tax levied determined, how. See *Rabe v. Board of Education*, 403.

The act of April 16, 1913 (103 O. L., 552), amending Sections 5649-2 and 5649-3*b*, General Code, does not provide for tax levies within Section 1*d*, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

LIMITATION OF ACTIONS—

Where real defendant appears by attorney and answers for party mistakenly sued, the statute of limitations (Section 11224, General Code) ceases to run from the time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Tractition Co.*, 156.

LIMITATION OF TAXES—

The act of April 16, 1913 (103 O. L., 552), amending Sections 5649-2 and 5649-3*b*, General Code, does not provide for tax levies within Section 1*d*, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Sections 5649-2 to 5649-5*b*, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

LOST WILL—

To establish a lost will the evidence must be clear, strong, positive, free from bias and convincing beyond a reasonable doubt

Lost Will—Master and Servant.

LOST WILL—Continued.

—Revocation is presumed where will has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

MALICIOUS PROSECUTION—

1. *In action for malicious prosecuting of attachment case—Malice and want of probable cause—Must be alleged and proven—*A suit for damages for causing an attachment to issue as auxiliary to a civil action for debt is no exception to the general rule that in all actions at common law for malicious prosecution or for the abuse of the processes of the court, malice and want of probable cause must be alleged and proven. *Crow v. Sims*, 214.
2. *Action maintainable on statutory bond, when—*In such case, in the absence of malice and want of probable cause, no action can be maintained except upon the statutory bond, if any, given in the attachment proceeding. *Ib.*
3. *Section 10254, General Code, requiring bond—Does not affect common law right of action, when—*The provision of Section 10254, General Code, requiring the plaintiff to furnish a bond before a writ of attachment shall issue, conditioned that the plaintiff will pay defendant the damages he may sustain if the order therefor is wrongfully obtained, has no application to and does not affect the common law right of action, but merely furnishes an additional statutory protection to the defendant. *Ib.*

MASTER AND SERVANT—

*Master and servant—Personal injury—Engineer of train not guilty of negligence—In misinterpreting signal by conductor, when—*A conductor of a train of cars undertook to control the movement of his train by a signal to the engineer from a place on the train where he could not see the engineer and the engineer could not see more of him than his head and his hand rising and falling beside his head. The signal was a backward motion of the arm in a complete verticle circle about the shoulder as a center. This could have been given as easily from a place where the body and the whole circuit of the arm of the conductor could have been seen by the engineer, and the rule of the service required that the conductor put himself in plain view of the engineer when giving

Master and Servant—Misconduct of Counsel.

MASTER AND SERVANT—Continued.

the signal. The movement of the hand up and down toward the engineer in a short arc means "go ahead." The engineer interpreted the signal as given to mean "go ahead" instead of "back up." *Held*: This was not negligence on the part of the engineer. *Railroad Co. v. Fouts*, 305.

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile—No implied authority for bookkeeper or cashier to operate company automobile, purchased for use of traveling salesman. See *Coal Co. v. Rivoux*, 18.

MILITIA—

Contributing members of military organizations—Section 5210, General Code—Provision of Section 5211, exempting same from jury service, void—Constitutional law—Because of the unequal terms upon which Section 5210, General Code, authorizes persons to become contributing members of the military organizations of the state the provision of Section 5211 to exempt such members from service as jurors is void. Hamann v. Heekin, 207.

MISCONDUCT OF COUNSEL—

1. *Judgment should not be reversed for misconduct of counsel, when—*A judgment should not be reversed for such misconduct of counsel for the prevailing party as tends only to discredit the administration of justice without subjecting the claim of the adverse party to prejudicial considerations not involved in the case. For misconduct of that character the trial court is authorized to apply more appropriate correctives. *Driscoll v. Traction Co.*, 150.
2. *Effect of retraction of counsel—And admonition of court—Court procedure—*A judgment should not be reversed for misconduct of counsel for the prevailing party in alleging facts which no evidence tends to establish if from the nature of the case, the retraction of counsel and the admonition of the court, it appears that the natural effect of the misconduct has been averted. *Ib.*

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

Moneys—Municipal Corporations.

MONEYS—

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

MOOT QUESTIONS—

The supreme court has no authority to pronounce opinion, judgment or decree upon a moot question as to whether proposed law will be constitutional, if enacted by legislature or adopted by people. See *Pfeifer v. Graves*, 473.

MOTION FOR VERDICT—

If motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

MOVING-PICTURE THEATERS—

Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

MUNICIPAL CORPORATIONS—

1. *Municipalities not insurers of safety of streets and sidewalks—But required to keep same in reasonably safe condition—*Municipalities not insurers of the safety of their streets and sidewalks, but are required to exercise ordinary care in keeping their streets and sidewalks in a reasonably safe condition for public travel, and a failure of duty in this respect is negligence. *Gibbs v. Village of Girard*, 34.
2. *Right of trial by jury inviolate—*The right of trial by jury, being guaranteed to all our citizens by the constitution of the state, can not be invaded or violated by either legislative act or judicial order or decree. *Ib.*
3. *Action for damages presents jury issue, when—Order of judge to direct verdict—Violation of right of jury trial, when—*A cause of action for damages brought against a village for negligence in the care of its sidewalks, by reason of which it is claimed plaintiff was injured, presents a jury issue if there is some evidence tending to prove every essential fact neces-

Municipal Corporations.

MUNICIPAL CORPORATIONS—Continued.

sary to entitle plaintiff to recover; and an order of the trial judge at the close of the plaintiff's case directing a verdict in favor of defendant over the objection of such plaintiff is a denial and violation of the right of trial by jury and therefore reversible error. *Ib.*

4. *Ordinary care, reasonable safety, etc.—Questions for jury, when*—What is ordinary care, what is reasonable safety, and the like, are, in the first instance, usually questions for the determination of the jury under all the evidence and proper instructions by the court, appropriate to the particular circumstances of each case and the issues thereof. *Ib.*
5. *Section 7, Article 18, amended Constitution—Authorises municipalities to frame charter for government—Departmental powers limited by Section 3, Article 18—Self-government of municipalities*—The provisions of Section 7, Article 18, of the Constitution as amended in September, 1912, authorize any city or village to frame and adopt or amend a charter for its government and it may prescribe therein the form of the government and define the powers and duties of the different departments provided they do not exceed the powers granted in Section 3, Article 18, nor disregard the limitations imposed in that article or other provisions of the constitution. *Fitzgerald v. Cleveland*, 338.
6. *Officers shall be appointed or elected—Nominations for elective offices may be by prescribed petition—Elections shall be conducted by general laws*—Under Sections 3 and 7, Article 18, as so amended, municipalities are authorized to determine what officers shall administer their government, which shall be appointed and which elected, that the nomination of elective officers shall be made by petition by a method prescribed, and elections shall be conducted by the election authorities prescribed by general laws. *Ib.*
7. *Municipal corporations—Compensation by telephone company—For use of streets*—A municipality has the power to demand and receive from a telephone company, for the privilege of digging ditches and laying and maintaining subsurface conduits for telephone wires under its streets, compensation beyond what is necessary to restore the pavement to its former state of usefulness. (*City of Columbus v. The Columbus Gas Co.*, 76 Ohio St., 309, approved and followed.) *Telephone Co. v. Columbus*, 466.
8. *Franchise stipulation for percentage of gross annual receipts—Not an assessment for general revenue, when*—A stipulation in the ordinance granting the privilege which requires the com-

Municipal Corporations—Negligence.

MUNICIPAL CORPORATIONS—Continued.

pany to pay, among other considerations, a certain percentage of its gross annual receipts into the municipal treasury for the use of the general expense fund, to which the company assented, though under protest, is not an assessment for general revenue in the nature of a tax. *Ib.*

Under Article 18, of the Constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, is constitutional. See *Assur v. Cincinnati*, 181.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Basis of calculation for issuance of bonds established, how—Amount of income from tax levies determined, how—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

NATIONAL GUARD—

The provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

NEGLIGENCE—

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile. See *Coal Co. v. Rivoux*, 18.

Negligence—Newspaper.

NEGLIGENCE—Continued.

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

An engineer of a railroad train is not guilty of negligence in misinterpreting a signal given him by a conductor, when. See *Railroad Co. v. Fouts*, 305.

NEGOTIABLE INSTRUMENTS—

1. *Negotiation of commercial paper—Policy of law to protect innocent holder*—It is the policy of the law in all negotiations of commercial paper, both in the interest of honest business and good morals, to protect the rights of all innocent holders for value and before maturity, and this equally whether such innocent holder be an individual or a corporation. *Bank v. Burns*, 434.
2. *Corporations can act only through agents—Knowledge of agent is knowledge of corporation, when*—A corporation can act only through its officers and agents, and the knowledge of such officers and agents in the transaction of the corporation's business within the scope of their authority become at once the knowledge of the corporation without any actual or presumptive communication from agent to principal. *Ib.*
3. *Bank officer acting as individual and as manager of bank—In purchase of note from himself by the bank—Manager's knowledge as man also knowledge of bank*—Where the officer is acting both for himself as an individual and as manager of a banking corporation in the purchase of a note from himself by the bank and his action in that behalf is adopted and ratified by the bank, the manager's knowledge as a man is equally his knowledge as manager of the bank. He can not unknow as manager what he knows as man. To hold otherwise would be to promote fraud rather than prevent it. *Ib.*

NEWSPAPER—

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

Nominations—One Per Cent. Law.

NOMINATIONS—

Municipalities may determine their officers and the method of their selection, nomination and election—The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government. See *Fitzgerald v. Cleveland*, 338.

NONRESIDENT ATTORNEY—

A nonresident attorney should not rely upon notification by opposite counsel or clerk of court of date set for trial. See *Hahn v. McBride*, 511.

NOTIFICATION—

A nonresident attorney should not rely upon notification by opposite counsel or clerk of courts of date set for trial. See *Hahn v. McBride*, 511.

OFFICE AND OFFICERS—

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-3b, General Code, substituting city solicitors for prosecuting attorneys on budget commissions in certain counties, is not an act providing for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Municipalities may determine their officers and the method of their selection, nomination and election—The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters are subject to provisions of Section 3, Article 18, authorizing local self-government. See *Fitzgerald v. Cleveland*, 338.

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

ONE PER CENT. LAW—

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

One Per Cent. Law—Partition.

ONE PER CENT. LAW—Continued.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

ORDINANCE—

Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when—Municipalities may demand and receive from telephone companies, for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state, when. See *Telephone Co. v. Columbus*, 466.

ORDINARY CARE—

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

PAROL AGREEMENT—

Where express authority to agent to make contract rests in parol, proof of parol authority must be clear and convincing, and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

PARTIES—

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant and will be bound by verdict and judgment—Statute of limitations ceases to run from time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Traction Co.*, 156.

PARTITION—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

Pending Actions—Petition.

PENDING ACTIONS—

Sections 2 and 6, Article 4, amendments to constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases pending in or decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

PERSONAL INJURIES—

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

On trial of an action for damages for personal injuries, if motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

PERSONAL PROPERTY—

Fire insurance company is advised of nature and extent of risk by description in policy, when—Where property insured is lumber of building in process of demolition, fee simple ownership clause does not apply, when—Chattel mortgage encumbrance clause does not release insurer, when. See *Ensel v. Insurance Co.*, 269.

Purchaser of real estate in partition proceedings acquires title to standing timber, although same sold by unrecorded instrument, when. See *Weir v. Saw Mill Co.*, 424.

PETITION—

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

Pleading—Principal and Agent.

PLEADING

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant and will be bound by verdict and judgment—Statute of limitations ceases to run from time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Traction Co.*, 156.

Malice and want of probable cause must be alleged and proven in an action for damages for causing an attachment to issue, when. See *Crow v. Sims*, 214.

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

POLICE PROSECUTOR—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

POSSESSION—

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

PREFERENTIAL BALLOT—

Municipalities may determine their officers and the method of their selection, nomination and election—Sections 3 and 7, Article 18, Constitution (1912)—Municipal charters and home rule. See *Fitzgerald v. Cleveland*, 338.

PRESUMPTION OF REVOCATION—

Revocation of a will is presumed where it has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

PRINCIPAL AND AGENT—

1. *Proceedings to enforce specific performance*—Written contract for sale of real estate—Signed by agent under express authority—Authority must conform to identical contract sued on—In a proceeding to enforce specific performance of a written

Principal and Agent—Principal and Surety.

PRINCIPAL AND AGENT—Continued.

contract for the sale of real estate, signed by an agent under express authority, it must be shown that the authority was such as to permit the making of the identical contract sued on, and not one differing therefrom in a material respect. *Spengler v. Sonnenberg et al.*, 192.

2. *If agent includes unauthorized terms in contract—Agreement void and unenforceable, when*—If an agent, acting under express authority to enter into a written contract for the sale of land, makes a contract for his principal which includes terms not authorized, the agreement is void, and its performance will not be enforced. *Ib.*

3. *Parol authority of agent must be clearly proven—Law of agency*—Where the express authority of an agent to sign an agreement in writing for the sale of lands rests in parol, the proof must be clear and convincing not only of such parol authority, but also that the authority was such as to permit the inclusion of all of the material terms which are embodied in the instrument. *Ib.*

Knowledge of officers and agents of corporation is imputed to company, when—Knowledge of manager of bank, in purchase of note from himself by bank, imputed to bank, when. See *Bank v. Burns*, 434.

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—No implied authority for bookkeeper or cashier to operate automobile, purchased for use of traveling salesman. See *Coal Co. v. Rivoux*, 18.

The underwriters of a fire insurance policy are advised of nature and extent of risk by description in policy, when—Failure by insured to mention release for damages by fire, question for court whether a material concealment, when. See *Ensel v. Insurance Co.*, 269.

PRINCIPAL AND SURETY—

Co-suretyship and contribution do not exist where several surety companies are bound to same principal on separate bonds, each surety limiting liability to proportion of loss by obligee—Collateral or securities given to one surety do not inure to benefit of all, when—Where principal makes assignment for benefit of creditors and a company purchases from assignee all assets (except cash), company liable for specific dividend guaranteed and entitled to surplus of collateral in hands of secured companies, when. See *Realisation Co. v. Bonding Co.*, 216.

Proceedings in Error—Prosecuting Attorney.

PROCEEDINGS IN ERROR—

Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to Constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hock-Hocking Co.*, 61.

Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

PROOF—

The supreme court will not consider weight of evidence, but will consider whether evidence produced in court below attains probative force and certainty required in particular case—To establish lost or destroyed will, evidence must be clear, strong, free from bias and convincing beyond a reasonable doubt—Revocation of will is presumed, when; where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure*, 1.

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

PROSECUTING ATTORNEY—

1. *Remedial statutes should be liberally construed*—Remedial statutes should be liberally construed so as to furnish all the remedy and accomplish all the purposes intended by the statutes. *State, ex rel. Maher, v. Baker*, 165.
2. *Moneys paid into county treasury*—For construction of county ditch are public moneys, when—Sections 4447 and 1277, *Revised Statutes*—Sections 6443 and 2921, *General Code*—Moneys paid into the county treasury by virtue of proceedings for the location and construction of a county ditch in conformity with

Prosecuting Attorney—Railroads.

PROSECUTING ATTORNEY—Continued.

Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code. (Overruling *Loe v. State, ex rel.*, 82 Ohio St., 73.) *Ib.*

3. *Duty of prosecuting attorney to recover excess paid on ditch contract, when*—It is not only the right but the duty of the prosecuting attorney to bring and maintain an action to recover from any contractor for the construction of such ditch any amount received by him in excess of the amount stipulated in the contract. *Ib.*

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-3b, General Code, substituting city solicitors for prosecuting attorneys on budget commissions in certain counties, is not an act providing for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

PROSECUTOR OF POLICE COURT—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

PUBLIC MONEYS—

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

PUBLIC PROPERTY—

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

RAILROADS—

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary

Railroads—Real Property.

RAILROADS—Continued.

discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

A railroad company is not liable for injuries, received by a conductor, caused by the engineer's misinterpreting conductor's signal, when. See *Railroad Co. v. Fouts*, 305.

REAL ESTATE SALE—

1. *Sale of real estate—In partition proceedings—Is judicial sale, when—Rights of bona fide purchaser—Under Section 8543, General Code*—A sale of real estate in a partition proceeding, under order of the court, is a judicial sale, and a bona fide purchaser at such sale is within the protection of the provisions of Section 8543, General Code. *Weir et al. v. Saw Mill Co.*, 424.
2. *Rule of caveat emptor—Unrecorded instrument*—The rule of caveat emptor, applicable to judicial sales, does not charge a purchaser at such sale with knowledge of the existence of an instrument conveying the real estate, or a part thereof, where the instrument has not been recorded or filed for record in the office of the recorder, and where the holder of the same has taken no step to put one on notice of its existence. *Ib.*
3. *Purchaser of real estate entitled to timber standing thereon—Although timber sold previous to real estate purchase—When timber sale not filed in recorder's office and purchaser without notice*—At a sale of real estate made in a partition proceeding, under order of the court, the purchaser acquires title to the standing timber thereon, although said timber had been sold by the person from whom the parties to the partition proceeding acquired title to the real estate by descent, and said sale of timber had been evidenced by a written instrument, but where said instrument had neither been recorded nor filed for record in the office of the recorder, and where the purchaser at the sale in the partition proceeding had no notice of the sale of said timber. *Ib.*

REAL PROPERTY—

In an action for specific performance of contract for sale of land, it must be shown that agent's authority was identical with terms of contract sued on—If terms of contract vary from express authority, agreement void and unenforceable—Where express authority rests in parol, proof of parol author-

Real Property—Referendum.

REAL PROPERTY—Continued.

ity must be clear and convincing and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

The acceptance of a deed and entering into possession binds grantee, and if grantee accepts benefits, he can not reject burdens, when. See *Miller v. Railway Co.*, 499.

REASONABLE CARE—

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

RECORDING DEED—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

REFERENDUM—

The act of April 16, 1913 (103 O. L., 552), relating to tax levy limitation and budget commissions, not being an act providing for tax levies within Section 1d, Article 2, Constitution, is subject to referendum and ninety-day limitation applies. See *State, ex rel., v. Milroy*, 301.

An initiated law, introduced in house of representatives and referred to committee, which reported it back with amendments which were agreed to, may be submitted to electors, when—Such amendments are incorporated in proposed law, when—In proceedings against secretary of state to enjoin submission to electors, Section 1b, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

Repeals by Implication—Right of Jury Trial.

REPEALS BY IMPLICATION—

Statutes in conflict with Sections 5649-2 to 5649-5b, General Code, limiting tax rate, are repealed by implication, when. See *Rabe v. Board of Education*, 403.

RESCISSION OF CONTRACT—

A petition to rescind a contract, alleging insufficiency of consideration, is demurrable, when. See *Forsythe v. Railway Co.*, 514.

REVENUE—

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

Franchise stipulation for percentage of gross annual receipts of telephone company, payable into general expense fund, not an assessment for general revenue, when. See *Telephone Co. v. Columbus*, 466.

REVERSIBLE ERROR—

Misconduct of counsel in addressing jury does not constitute reversible error, when. See *Driscoll v. Traction Co.*, 150.

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

REVOCATION OF WILL—

Revocation of a will is presumed where it has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

RIGHT OF JURY TRIAL—

Constitutional right of jury trial can not be invaded by legislative act or judicial order or decree—Action for damages for negligence in care of sidewalks, presents jury issue, when; directed verdict is violation of right of jury trial, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

Rules of Practice—Secretary of State.

RULES OF PRACTICE—

Under the constitutional amendments and the schedule, all cases pending in the courts shall proceed to judgment, how—Cases pending in courts of appeals January 1, 1913, may be reviewed by supreme court, when—Cases brought in courts of appeals after January 1, 1913, not reviewable by supreme court, unless they originate in courts of appeals, involve constitutional questions, are felony cases or are cases of public or great general interest—Rules of supreme court for prosecuting error proceedings in foregoing cases—Disposition of cases filed in supreme court prior to this interpretation. See *Akron v. Roth*, 456.

SALE OF LANDS—

In an action for specific performance of contract for sale of land, it must be shown that agent's authority was identical with terms of contract sued on—If terms of contract vary from express authority, agreement void and unenforcible—Where express authority rests in parol, proof of parol authority must be clear and convincing and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

SALE OF REALTY—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

SCINTILLA RULE—

Action for damages for negligence in care of sidewalks, presents jury issue if there is some evidence tending to prove essential facts necessary to a recovery; order of trial judge directing verdict is a denial and violation of right of trial by jury, when. See *Gibbs v. Village of Girard*, 34.

SECRETARY OF STATE—

In proceedings against secretary of state to enjoin submission of initiated law to electors, Section 1b, Article 2, Constitution (1912), will not be rigidly construed, when. See *Pfeifer v. Graves*, 473.

Self-government—Smith One Per Cent. Law.

SELF-GOVERNMENT—

Under Article 18 of the Constitution, amended September, 1912, general laws for government of municipalities continue in force until November 15, 1912, and thereafter until changed by (1) The enactment of general laws for their amendment, (2) additional laws to be ratified by municipal electors and (3) adoption of municipal charter—Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

The provisions of Section 7, Article 18, Constitution (1912), authorizing municipal charters, are subject to provisions of Section 3, Article 18, authorizing local self-government—Municipalities may determine their officers and the method of their selection, nomination and election. See *Fitzgerald v. Cleveland*, 338.

SHOOTING WITH INTENT, ETC.—

An indictment charging shooting with intent to kill and shooting with intent to wound, includes lesser offenses of assault and battery or assault only, when—Omission of court to so charge jury, will not sustain reversal of judgment of conviction of shooting with intent to wound, when. See *State v. McCoy*, 447.

SIDEWALKS—

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

SIGNAL—

An engineer of a railroad train is not guilty of negligence in misinterpreting a signal given him by a conductor, when. See *Railroad Co. v. Fouts*, 305.

SMITH ONE PER CENT. LAW—

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Smith One Per Cent. Law—Statutes.

SMITH ONE PER CENT. LAW—Continued.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

SPECIFIC PERFORMANCE—

In an action for specific performance of contract for sale of land, it must be shown that agent's authority was identical with terms of contract sued on—If terms of contract vary from express authority, agreement void and unenforceable—Where express authority rests in parol, proof of parol authority must be clear and convincing and also show authority to include all material terms embodied in contract. See *Spengler v. Sonnenberg*, 192.

STATUTE OF LIMITATIONS—

Where real defendant appears by attorney and answers for party mistakenly sued, the statute of limitations (Section 11224, General Code), ceases to run from the time real defendant appears and answers for party mistakenly sued. See *Boehmke v. Traction Co.*, 156.

STATUTES—

An assistant city solicitor, designated as police prosecutor by city solicitor under Section 1536-663, Revised Statutes, is entitled to compensation from county, when. See *Thomas, Jr., v. Commissioners*, 489.

Under Section 3244, Revised Statutes (Section 8634, General Code), incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Moneys paid into county treasury, under Sections 4447, *et seq.*, Revised Statutes, and Sections 6443, *et seq.*, General Code, relating to location and construction of a county ditch, are public moneys within the meaning of Section 1277, Revised

Statutes—Stock Subscriptions.

STATUTES—Continued.

Statutes, and Section 2921, General Code—Prosecuting attorney may maintain action to recover such moneys, when. See *State, ex rel., v. Baker*, 165.

Section 5210, General Code, being of unequal operation, the provision of Section 5211, General Code, exempting contributing members of military organizations from jury service, is void. See *Hamann v. Heekin*, 207.

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions, does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

Sections 5649-2 to 5649-5b, General Code, limit the rate of taxes for any and all purposes, when—Existing statutes in conflict therewith, repealed by implication—Method of determining amount of income from taxes levied or to be levied—Bond issues limited, how. See *Rabe v. Board of Education*, 403.

Sale of real estate in partition proceeding, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when. See *Weir v. Saw Mill Co.*, 424.

Section 10254, General Code, requiring attachment bond, does not affect common law right of action for damages for causing attachment to issue, when. See *Crow v. Sims*, 214.

Where real defendant appears by attorney and answers for party mistakenly sued, real defendant subject to jurisdiction, may be substituted as defendant (Section 11363, General Code), and will be bound by verdict and judgment. Statute of limitations (Section 11224, General Code) ceases to run from time real defendant answers for party sued. See *Boehmke v. Traction Co.*, 156.

STOCKHOLDERS—

Under Section 8634, General Code, incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

STOCK SUBSCRIPTIONS—

Under Section 8634, General Code, incorporators of corporation for profit are liable to creditors for deficiency in payment of ten per cent. of authorized capital stock for debts created prior to organization. See *Ames v. McCaughey*, 297.

Streets and Alleys—Substitution of Parties.

STREETS AND ALLEYS—

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

Under Section 3283a, Revised Statutes (Section 8767, General Code), board of directors of railroad corporation has primary discretion to determine necessity of appropriation of public property, but under Section 6420, Revised Statutes (Section 11046, General Code), the court has final authority. See *Cincinnati v. Railroad Co.*, 283.

Municipalities may demand and receive from telephone companies, for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state—Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when. See *Telephone Co. v. Columbus*, 466.

SUBROGATION—

Stipulation in fire insurance policy for subrogation in case of fire, construed against insurer, when. See *Ensel v. Insurance Co.*, 269.

SUBSTITUTION OF PARTIES—

1. *Plaintiff in action for damages—Sues defendant under mistaken name—Real wrongdoer voluntarily answers—Latter thereby submits himself to the jurisdiction of court—And may be substituted as real defendant—*Where one knows himself to be the wrongdoer sought to be made liable in an action of damages for the wrong, and voluntarily appears by his attorney and answers in the name of and ostensibly as another person who was by the plaintiff named as defendant, and served with process in the mistaken belief that the latter person did the wrong, the former person thereby submits himself to the jurisdiction of the court and may be substituted as the real defendant in place of the nominal defendant sued by mistake; and the substituted defendant will be bound by the verdict and judgment rendered against him in the case. *Boehmke v. Traction Co.*, 156.
2. *Statute of limitations—Ceases to run, when—*The statute of limitations will cease to run from the time the real defendant appears and answers in name of the nominal defendant. *Ib.*

Supreme Court.

SUPREME COURT—

1. *Cases pending in courts January 1, 1913—To proceed, how—Constitutional amendments of 1912*—In determining the manner in which the exercise of the authority of this court to review judgments of the court of appeals in “cases of public or great general interest” under the constitutional amendments of 1912 shall be invoked conclusive effect should be given to the following provisions of the fourth article which relate especially to that subject: “In cases of public or great general interest the supreme court may, within such limitation of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals;” and “All pending cases and proceedings in the circuit courts shall proceed to judgment and be determined by the respective courts of appeals, and the supreme court, as now provided by law, and cases brought into said court of appeals after the taking effect hereof shall be subject to the provisions hereof.” In order that such effect may be given them, the provision of the final schedule that “all cases pending in the courts on the first day of January, 1913, shall be heard and tried in the same manner and by the same procedure as is now authorized by law” must be regarded as meaning that all cases pending in the several courts of the state shall proceed in such courts according to existing procedure. *Akron v. Roth*, 456.
2. *Supreme court jurisdiction—To review judgments of cases in lower courts*—In the procedure prescribed by the provisions of the fourth article all judgments which the court of appeals may render in cases involving questions arising under the Constitution of the United States or of this state, in cases of felony (on leave first obtained) and in cases which originated in the courts of appeals, without regard to the time when the cases may be brought into that court, there may be a review by this court by proceedings in error instituted in accordance with the laws in force January 1, 1913; and the same course may be taken for the review of judgments of the court of appeals in cases of public or great general interest, if the cases were pending in the circuit court on said first day of January. *Ib.*
3. *Cases pending in courts of common pleas on January 1, 1913—Subject to review by court of appeals and supreme court, when*—As to cases brought into the court of appeals after said first day of January, a proceeding to obtain a review by this court of a judgment of the court of appeals in a case of

Supreme Court.

SUPREME COURT—Continued.

public or great general interest, and not within our jurisdiction for any other reason, must be instituted by an application for an order of this court directing the court of appeals to certify its record in the case to this court, such application to be made by motion showing from the record (a) that the case is of public or great general interest, and (b) that error has probably intervened; notice of such motion to be given in accordance with the general rule. *Ib.*

4. *Limitation of seventy days from date of judgments of courts of appeals—For filing application for hearing in supreme court*—No limitation as to the time of making such application having been prescribed by law, a limitation of seventy days from the date of such judgments in cases of public or great general interest as the court of appeals may hereafter render is hereby prescribed, and in cases of that character in which the court of appeals has already rendered final judgment since said first day of January, including the cases in which the motions now under consideration are filed, applications may be made at any time before the first day of January, 1914. *Ib.*

5. *Disposition of cases filed in supreme court—Involving question of jurisdiction*—All proceedings in error instituted here for the review of judgments of the court of appeals in cases not within our jurisdiction, except as they may be cases of public or great general interest, and instituted without obtaining an order of this court to the court of appeals to certify its record, will be dismissed, but without prejudice to the right of the aggrieved party to apply here for such an order in accordance with propositions 3 and 4 of this syllabus. All motions to dismiss proceedings in error instituted here in accordance with the practice prescribed for proceedings in error by the law in force on the first day of January, 1913, in cases which at that date were pending in the circuit court will be overruled. *Ib.*

The supreme court will not consider weight of evidence, but will consider whether evidence produced in court below attains probative force and certainty required in particular case. See *Cole v. McClure et al.*, 1.

Rights to invoke jurisdiction of courts of review will not be held to have been revoked, when—Sections 2 and 6, Article 4, amendments to constitution, adopted in 1912, do not revoke jurisdiction of supreme court to review cases decided by circuit courts prior to January 1, 1913. See *Hupp v. Hocking Co.*, 61.

Suretyship—Taxation.

SURETYSHIP—

Co-suretyship and contribution do not exist where several surety companies are bound to same principal on separate bonds, each surety limiting liability to proportion of loss by obligee—Collateral or securities given to one surety do not inure to benefit of all, when—Where principal makes assignment for benefit of creditors and a company purchases from assignee all assets (except cash), company liable for specific dividend guaranteed and entitled to surplus of collateral in hands of secured companies, when. See *Realization Co. v. Bonding Co.*, 216.

Knowledge by an employer of previous default by employe, not a defense to a suit on a surety bond, when. See *Legler, Admr., v. Guaranty Co.*, 336.

TAXATION—

1. *Taxation—Limitation on tax rate—Sections 5649-2 to 5649-5b, General Code—Statutes in conflict repealed by implication—*Sections 5649-2 to 5649-5b, General Code, inclusive, limit the rate of taxes that can be levied in any taxing district for any and all purposes. Any statutes existing at the time of the passage of these sections, in direct conflict therewith and not specifically repealed thereby, are repealed by implication. *Rabe v. Board of Education*, 403.
2. *Basis of calculation for issue of bonds established, how—*These sections of the General Code furnish the basis of calculation for the issue of bonds in anticipation of income from taxes levied or to be levied. *Ib.*
3. *Limitation of issuance of bonds—*Bonds can not be issued in anticipation of income from taxes levied or to be levied in an amount greater than the income to be anticipated thereby. *Ib.*
4. *Amount of income from taxes to be levied—In anticipation of bond issue—To be determined, how—*In determining the amount of income from taxes levied or to be levied that may be anticipated by an issue of bonds by any taxing authority, the calculation must be based on the same proportion of the total maximum levy in any one taxing district as the proportion of the maximum levy it is authorized to certify to the budget commissioners is to the total maximum levies that all the taxing authorities within that taxing district are authorized to certify. *Ib.*

The act of April 16, 1913 (103 O. L., 552), amending Section 5649-2, General Code, relating to tax levy limitation, and Section 5649-3b, General Code, establishing budget commissions,

Taxation—Torts.

TAXATION—Continued.

does not provide for tax levies within Section 1d, Article 2, Constitution, and is subject to referendum and ninety-day limitation. See *State, ex rel., v. Milroy*, 301.

TAX INQUISITOR—

A person employed by contract with county to discover property and taxes omitted from duplicate is entitled to compensation only out of taxes recovered during term of contract—Such person is not entitled to compensation out of taxes subsequently collected on omitted property discovered by him—Services in inducing subsequent auditor to place same omitted property on duplicate for time not included in contract, held to be gratuitous. See *Edmondson v. Deckebach*, 48.

TELEPHONE COMPANIES—

Municipalities may demand and receive from telephone companies, for privilege of laying and maintaining conduits, compensation beyond cost of restoration of streets and alleys to former state—Franchise stipulation for percentage of gross annual receipts, not an assessment for general revenue, when. See *Telephone Co. v. Columbus*, 466.

THEATERS—

Municipalities can not establish and maintain moving-picture theaters by taxation, under powers of local self-government. See *State, ex rel., v. Lynch*, 71.

TIMBER—

Purchaser of real estate in partition proceedings acquires title to standing timber, although same sold by unrecorded instrument, when. See *Weir v. Saw Mill Co.*, 424.

TORTS—

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile. See *Coal Co. v. Rivoux*, 18.

Municipalities are not insurers of safety of streets and sidewalks, but failure to exercise ordinary care and keep same in reasonably safe condition is negligence—Action for damages

Torts—Trial.

TORTS—Continued.

for negligence in care of sidewalks, presents jury issue, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

TOWNSHIPS—

The act of April 10, 1913 (103 O. L., 141), authorizing counties, townships and municipalities to issue emergency bonds, etc., to repair, replace or reconstruct public property damaged by floods of March and April, 1913, is constitutional. See *Assur v. Cincinnati*, 181.

TRAVELING SALESMAN—

No implied authority for bookkeeper or cashier to operate company automobile, purchased for use of traveling salesman—Owner not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment. See *Coal Co. v. Rivoux*, 18.

TRIAL—

Misconduct of counsel in addressing jury does not constitute reversible error, when. See *Driscoll v. Traction Co.*, 150.

Omission of court to charge jury that defendant, indicted for shooting with intent to kill and shooting with intent to wound, may be found guilty of lesser offenses of assault and battery or assault only, will not sustain reversal of judgment of conviction of shooting with intent to wound, when—General exception to charge raises no question of error as to omission to give further correct instruction, but presents only questions of errors existing in charge as given. See *State v. McCoy*, 447.

If motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

A nonresident attorney should not rely upon notification by opposite counsel or clerk of courts of date set for trial. See *Hahn v. McBride*, 511.

Newspaper account of facts of cause, published during trial, does not constitute reversible error, unless proof establishes that jurors read account—Misconduct of counsel during trial. See *Dock Co. v. Trapnell*, 516.

Trial by Jury—Words and Phrases.

TRIAL BY JURY—

Constitutional right of jury trial can not be invaded by legislative act or judicial order or decree—Action for damages for negligence in care of sidewalks, presents jury issue, when; directed verdict is violation of right of jury trial, when—What is ordinary care, reasonable safety, etc., are questions for jury, when. See *Gibbs v. Village of Girard*, 34.

UNRECORDED DEED—

Sale of real estate in partition proceedings, is a judicial sale, and *bona fide* purchaser is within protection of Section 8543, General Code, when—Rule of *caveat emptor* does not charge purchaser with knowledge of unrecorded instrument, when—Purchaser acquires title to standing timber, when. See *Weir v. Saw Mill Co.*, 424.

VERDICT—

If motions are made by both plaintiff and defendant for a directed verdict, and a subsequent motion is made to submit the case to the jury, the same must go to the jury, when. See *Perkins v. Commissioners*, 495.

WEIGHT OF EVIDENCE—

The supreme court will not consider weight of evidence, but will consider whether evidence produced in court below attains probative force and certainty required in particular case. See *Cole v. McClure et al.*, 1.

WILLS—

To establish a lost or destroyed will the evidence must be clear, strong, positive, free from bias and convincing beyond a reasonable doubt—Revocation is presumed where will has been lost or destroyed before death of testator; and where testator became insane after making will, evidence to overcome presumption of revocation must be certain, satisfactory and conclusive that it was unrevoked and in existence after insanity. See *Cole v. McClure et al.*, 1.

WORDS AND PHRASES—

Bill, act and law distinguished. See *Pfeifer v. Graves*, 480.

Writ of Attachment—Wrongful Death.

WRIT OF ATTACHMENT—

Malice and want of probable cause must be alleged and proven in an action for damages for causing an attachment to issue, when—Action can be maintained on statutory bond, when—Section 10254, General Code, requiring attachment bond, does not affect common law right of action, when. See *Crow v. Sims*, 214.

WRONGFUL DEATH—

Automobile owner is not liable for acts of employe in operating automobile unless latter engaged in employer's business and acting within scope of employment—Mere ownership of automobile and negligent operation of same do not make *prima facie* case against owner, without proof of authority to operate automobile. See *Coal Co. v. Rivoux*, 18.

Ex. J. M.
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